Supreme Court, U.S.
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No.

In the
Supreme Court of the United States
October Term, 1995

The Freedom From Religion Foundation, Inc., a Wisconsin nonprofit Corporation; The Colorado Chapter of the Freedom From Religion Foundation, Inc.; Jeff Baysinger; Harold Huguley; Glenn V. Smith; and Lee Whitfield,

Petitioners,

v.

The State of Colorado; The Honorable Roy Romer, Governor of the State of Colorado; The Colorado Department of Administration; and Forrest M. Cason, Executive Director of the Department of Administration,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court, State of Colorado

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the court below err in holding that the State of Colorado may permanently display the Ten Commandments on the State Capitol grounds without violating the Establishment Clause?

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Petitioners respectfully petition for a Writ of Certiorari to review the judgment entered by the Colorado Supreme Court in this proceeding.

OPINIONS BELOW

The majority and dissenting opinions of the Colorado Supreme Court are reported at 898 P.2d 1013 (S.Ct. Colo. 1995). The majority opinion is reprinted in the Appendix ("App.") to this petition at App. E1-E28 and the dissenting opinions are reprinted at App. E29-E71. The majority's decision reversed the unanimous decision of the Colorado Court of Appeals and reinstated the order of the Denver District Court. The District Court order was entered after remand from the Colorado Court of Appeals which reversed a previous order of the Denver District Court granting the Respondents' motion for summary judgment. The Colorado Court of Appeals' opinion is reported at 872 P.2d 1276 and is reprinted at App. I1-I19 . The opinion and order of the Denver District Court which was reinstated by the Colorado Supreme Court is unreported and is printed at App. K1-K2 and L1-L11. The opinion of the Colorado Court of Appeals reversing the District Court's order granting summary judgment is unreported and is printed at App. M1-M5. The Denver District Court order granting Respondents' motion for summary judgement is printed at App. P1-P2.

STATEMENT OF JURISDICTION OF THE COURT

The decision of the Colorado Supreme Court was rendered on June 12, 1995. *See* App. E. A Petition for Rehearing was denied *en banc* by order entered on June 30, 1995. App. B1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

At issue in this case is a three by four feet granite monument inscribed with the Ten Commandments, various other religious characters, the American flag, and a bald eagle, our national symbol. A color photograph of the monument is reproduced in the Appendix to this Petition. *See* App. S1. The text of the Ten Commandments, including the exhortation "I AM the LORD thy God", predominates. App. S1. At the bottom of the monument is a statement that it was presented by the members of the Fraternal Order of Eagles. App. S1. The monument was donated to the State of Colorado and was placed at its present site in Lincoln Park in the mid-1950s; it has remained there ever since. App. E9, E50. Lincoln Park is a one square block park owned by the State of Colorado located immediately west of the

State Capitol building. App. E4-E5. It is part of a three block complex commonly known as the "Capitol Complex Grounds". App. E5.

The monument is situated in the northwest quadrant of Lincoln Park. App. E6. As will be explained in greater detail later in this Petition, there are several other monuments located in Lincoln Park. App. E4-E6. Outside the Park, on the remainder of the Capitol Complex grounds, are additional memorials and tributes many of which are on the east end of the Capitol Complex and are not visible from Lincoln Park. App. E51-E52.

The Ten Commandments monument was donated to the State as part of a nationwide campaign to instill the principles of God's message to Moses in youngsters. App. E8-E9. This idea was originated by a retired Minnesota juvenile court judge who encouraged placement of the Ten Commandments in juvenile courtrooms around the country and persuaded the Eagles to support the project. App. E8. Financial help was received from Cecil B. DeMille who was then promoting his movie spectacle "The Ten Commandments". App. E9. There are a number of similar monuments located on public grounds around the United States. App. E9.

Petitioners in this case are (1) a nonprofit corporation which promotes the separation of church and state[1], (2) its Colorado Chapter, and (3) several individuals who are residents and taxpayers of the State of Colorado. Respondents are the State of Colorado and certain governmental departments and officials, including Governor Roy Romer.

Petitioners filed their complaint with the Denver District Court on March 16, 1989 after their written request that the Ten Commandments monument be removed was denied by Governor

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[1] The Freedom From Religion Foundation, Inc. is a nonprofit corporation organized and existing under the laws of the State of Wisconsin. The Foundation does not issue securities and has no parents or subsidiaries.

Romer. *See* Apps. Q and R. The complaint sought removal of the monument on both federal and state constitutional grounds. App. Q.

On October 13, 1989, the Denver District Court dismissed the complaint by granting a motion for summary judgment. App. P. By order dated February 7, 1991, the Colorado Court of Appeals reversed the trial court and remanded the case for trial. App. M. A trial to the Court was held on December 9-11, 1991. Immediately at its conclusion, the Trial Court delivered its findings and conclusions ordering that the case be dismissed with prejudice. Apps. K and L.

Upon appeal by Petitioners here, the Colorado Court of Appeals reversed the judgment of the trial court. App I. Respondents here petitioned the Colorado Supreme Court for a writ of certiorari which was granted on May 2, 1994. App. F. The Colorado Supreme Court, by a divided vote of four to three, reversed the judgment of the Colorado Court of Appeals. App E. Petitioners here moved for rehearing which was denied by a four to three vote. App. B.

The federal question sought to be reviewed was raised at the beginning of proceedings before each State court involved in this case. It was first raised in the Complaint filed with the Denver District Court (App. Q), in the Notice of Appeal filed with the Colorado Court of Appeals (App. J), and in the Petition for a Writ of Certiorari filed with the Colorado Supreme Court (App. G). Petitioners have exhausted their remedies in the Colorado state courts and now seek review by this Honorable Court.

REASONS FOR GRANTING THE WRIT

Lincoln Park is one block west of the Colorado State Capitol building. App. E4-E5. It is bounded by Lincoln Street and Broadway on the east and west respectively and by Colfax and East 14th Avenues on the north and south. Lincoln Park is owned by the State of Colorado and is the size of one square city block. App. E5.

In the northwest quadrant of Lincoln Park, beside a walkway which runs diagonally across the Park, sits a three by four foot granite monument emblazoned with the Ten Commandments. App. E6, S1. The monument is owned and maintained by the State of Colorado. App. E9. It is a permanent fixture in the Park having been placed there in the mid-1950s. App. E9, E50.

To the West of the monument, about thirty feet away, is a drinking fountain memorializing a woman who aided war survivors in the early part of this century. App. E6. About fifty feet to the east of the monument is a large statue of a World War II Hispanic Medal of Honor Winner. App. E6. Further away, in the center of Lincoln Park, are a flagpole honoring participants in the Spanish-American War and the Park's dominant monument, an obelisk dedicated to Colorado's war veterans. App. E5. To the south of the obelisk is a replica of the Liberty Bell. App. E6.

Lincoln Park is one block of a three block area known as the "Capitol Complex Grounds". App. E5. On the remaining two blocks are various memorials and tributes including an arboreal tribute to the deceased Challenger astronauts, a monument commemorating the Armenian genocide, a buffalo and Indian monument, and several other war and veterans' memorials. App. E5, E51. Many of these monuments and memorials are on the east end of the Capitol Complex and are not visible from Lincoln Park. App. E51-52.

By a four to three vote, the Colorado Supreme Court (hereinafter, the "majority") decided that, when taken as a whole, the above setting secularizes the Ten Commandments monument and that the monument would not be viewed by a reasonable observer as an endorsement of religion by government. This ruling has no foundation in law or fact and must not be allowed to stand. It is in direct conflict with this Court's decisions in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) and *Stone v. Graham*, 449 U.S. 39 (1980), *reh. den.* 449 U.S. 1104 (1981), and with the decision of the United States Court of Appeals for the Eleventh Circuit in *Harvey v. Cobb*

County, Ga., 811 F. Supp 669 (N.D. Ga. 1993), *aff'd.* 15 F.3d 1097 (11th Cir. 1994), *cert. den.* ____ U.S. ____, 114 S.Ct. 2138 (1994).

Allegheny County v. Greater Pittsburgh ACLU, supra, involved a creche in the grand staircase of the Allegheny County courthouse and a Menorah scene on County property about one block away. This Court treated the two scenes as separate displays ruling that the creche "...was its own display distinct from any other decorations or exhibitions in the building..." 492 U.S. 598, n. 48. It did not merge the creche and the Menorah into a single display even though both were argued to be symbolic of the Christmas holiday season. This Court held that the creche was an unconstitutional establishment of religion and that the Menorah was not. Unlike the case here, both displays were temporary.

Here, the majority has held that the Ten Commandments "display" encompasses a full square city block. App. E25. It implies that the remaining two blocks of the Capitol Complex grounds, including an area not even visible from the monument site, are also part of the display. *See* App. E23-E24. This is an unwarranted departure without precedent in decisions of this Court involving public displays of religious objects.

There is nothing in the immediate vicinity of the Ten Commandments monument. The closest objects are the aforementioned drinking fountain about thirty feet to the west and the World War II statue some fifty feet to the east. App. E6. No evidence was presented in this case to even remotely suggest that these or any of the other objects in Lincoln Park have, or were intended to have, any relevance to Ten Commandments monuments. The Ten Commandments monument stands by itself and it should have been treated as its own display for Establishment Clause purposes. The majority's integration of the monument with unrelated monuments in Lincoln Park was in conflict with this Court's ruling in *Allegheny County* and should be rejected by this Court.

Having integrated the Ten Commandments monument with the other objects in Lincoln Park, the majority then proceeded to hold that the Ten Commandments are part of United States and Colorado history and, therefore, that the monument is presented in a way that gives it secular effect. App. E24-25. This is in conflict with *Allegheny County* and with the decision of this Court in *Stone v. Graham, supra.* In *Stone*, this Court stated that the Ten Commandments are "...undeniably a sacred text in the Jewish and Christian faiths...". 449 U.S. 41. It ordered that a schoolhouse display of the Ten Commandments be removed even though it contained a statement avowing a secular purpose.[2]

The Ten Commandments antedate the United States and the State of Colorado by more than two thousand years. They are *not* a part of American or Colorado history. Rather, they are part of religious history. They form much of the foundation for the Jewish and Christian faiths. *Stone v. Graham*, 449 U.S. 41. If one accepts the majority's logic, any religious object could be placed with impunity on public property, including a crucifixion or even a church.

An argument can be made that the Ten Commandments constitute part of American history in a secular sense in that they form a basis for our system of laws. App. E22. Following this line of reasoning, the Ten Commandments could be displayed by government but only on the condition that they are presented in a context that emphasizes such secular meaning. In *Allegheny County*, a Jewish Menorah was permissible because it was presented as part of a display celebrating the holiday season whereas a nearby creche was not. Assuming *arguendo* that the secular significance of the Ten

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[2] The majority opinion relies heavily on *Anderson v. Salt Lake City Corporation*, 475 F.2d. 29 (10th Cir. 1973), *cert. den.* 414 U.S. 879 (1973). The Court in *Anderson* held that a Ten Commandments monument which sat alone and unattended on the courthouse grounds to be "primarily secular". *Id.* at 34. In view of this Court's subsequent decisions in *Allegheny County v. Greater Pittsburgh ACLU* and *Stone v. Graham, supra, Anderson* has no precedental value.

Commandments is their relationship to American law, they are clearly not presented in Lincoln Park in that context. The remaining displays in Lincoln Park are memorials to war and to the American revolution. Nothing is displayed in the Park or, for that matter in the rest of the Capitol Complex, which remotely relates to the system of laws or jurisprudence in the United States or the State of Colorado.[3] In fact, the Ten Commandments monument is totally out of place in Lincoln Park.

The majority's decision conflicts with *Harvey v. Cobb County, Ga.*, 811 F. Supp 669 (N.D. Ga. 1993), *aff'd.* 15 F.3d 1097 (11th Cir. 1994), *cert. den.*, ____ U.S. ____, 114 S.Ct. 2138 (1994). There, it was held that a display of the Ten Commandments in the county courthouse was unconstitutional even though it was argued to be "...a historical, jurisprudential cornerstone of American legal significance". *Id.* 811 F. Supp. 677.

This Court should grant certiorari to clearly and decisively correct the Colorado Supreme Court's error. In a constitutional area as sensitive as the Establishment Clause, this untenable decision should not be allowed to stand. The matter of religious displays is one of the most contentious in the field of constitutional law. If this Court does not reverse this decision, it is likely that many state and local jurisdictions will use it as basis for unwarranted intrusions on the United States Constitution.

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[3] In order to rationalize that the Ten Commandments monument does not convey a religious message, the majority characterizes the various displays in Lincoln Park as "much like a museum". App. E24. Conceivably, the Ten Commandments could properly be displayed by government in a museum setting as part of a history of religion. However, there is nothing in the record of this case to sustain such a finding. Neither Lincoln Park nor the remainder of the Capitol Complex is a museum nor were they ever intended to be a museum. *See* App. E63. A museum is a place where objects are displayed for educational, scientific, or artistic purposes. The displays on the Capitol grounds are tributes to wars, war heroes, veterans, the Challenger astronauts, etc. Like the Ten Commandments in this case, they are intended to inspire reverence, not to educate or inform.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 27, 1995

STATE OF COLORADO

COURT OF APPEALS

2 East Fourteenth Avenue, Suite 300
Denver, Colorado 80203
(303) 837-3785

MANDATE

Court of Appeals No. 92CA0107
Trial Court No. 89CV4275

The Freedom from Religion Foundation, Inc. et al.
v.
The State of Colorado et al.

THIS CAUSE came to be heard on the record on appeal from the District Court, City and County of Denver, State of Colorado, was argued by counsel, opinion issued and judgment entered. Petition for Certiorari was applied for and granted in the Colorado Supreme Court. An opinion was announced by the Supreme Court on June 12, 1995, wherein the judgment of the Colorado Court of Appeals was reversed.

WHEREFORE IT IS ORDERED, that the judgment of the District Court, City and County of Denver, is affirmed. Copies of the opinions of the Supreme Court and the Court of Appeals are attached.

WITNESS, the HONORABLE ALAN L. STERNBERG, Chief Judge of the Colorado Court of Appeals and the Seal thereof, affixed this 30th day of June, 1995.

BY: PATRICK SANFORD
Clerk of the Court

SUPREME COURT, STATE OF COLORADO
CASE NO. 93SC554
CERTIORARI TO THE COLORADO COURT OF APPEALS, 92CA0107
DISTRICT COURT, CITY AND COUNTY OF DENVER, 89CV4275

ORDER OF COURT

THE STATE OF COLORADO; ROY ROMER, GOVERNOR OF THE STATE OF COLORADO; DEPARTMENT OF ADMINISTRATION, STATE OF COLORADO; AND FORREST CASON, EXECUTIVE DIRECTOR, DEPARTMENT OF ADMINISTRATION,

Petitioners,

v.

THE FREEDOM FROM RELIGION FOUNDATION, INC., A WISCONSIN NON-PROFIT CORPORATION; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.; JEFF BAYSINGER; HOWARD HUGULEY; GLENN V. SMITH; AND LEE WHITFIELD,

Respondents.

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 30, 1995.

Justice Erickson, Justice Lohr and Justice Kirshbaum would grant the Petition.

SUPREME COURT, STATE OF COLORADO
CASE NO. 93SC554
CERTIORARI TO THE COLORADO COURT OF APPEALS, 92CA0107
DISTRICT COURT, CITY AND COUNTY OF DENVER, 89CV4275

ORDER OF COURT

THE STATE OF COLORADO; ROY ROMER, GOVERNOR OF THE STATE OF COLORADO; DEPARTMENT OF ADMINISTRATION, STATE OF COLORADO; AND FORREST CASON, EXECUTIVE DIRECTOR, DEPARTMENT OF ADMINISTRATION,

Petitioners,

v.

THE FREEDOM FROM RELIGION FOUNDATION, INC., A WISCONSIN NON-PROFIT CORPORATION; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.; JEFF BAYSINGER; HOWARD HUGULEY; GLENN V. SMITH; AND LEE WHITFIELD,

Respondents.

Upon consideration of the Respondents' Motion for Enlargement of Time to File Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Motion shall be, and same hereby is, GRANTED.

BY THE COURT, JUNE 29, 1995.

SUPREME COURT, STATE OF COLORADO
CASE NO. 93SC554
CERTIORARI TO THE COLORADO COURT OF APPEALS, 92CA0107
DISTRICT COURT, CITY AND COUNTY OF DENVER, 89CV4275

MANDATE

THE STATE OF COLORADO; ROY ROMER, GOVERNOR OF THE STATE OF COLORADO; DEPARTMENT OF ADMINISTRATION, STATE OF COLORADO; AND FORREST CASON, EXECUTIVE DIRECTOR, DEPARTMENT OF ADMINISTRATION,

Petitioners,

v.

THE FREEDOM FROM RELIGION FOUNDATION, INC., A WISCONSIN NON-PROFIT CORPORATION; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.; JEFF BAYSINGER; HOWARD HUGULEY; GLENN V. SMITH; AND LEE WHITFIELD,

Respondents.

This cause having been brought to this court on a writ of certiorari to the Colorado Court of Appeals to review the judgment of said court of appeals, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED and adjudged that the judgment of the court of appeals is reversed.

NOW THEREFORE, jurisdiction of this cause is returned to the court of appeals.

WITNESS, the HONORABLE LUIS D. ROVIRA, Chief Justice of our Supreme Court and the Seal thereof, affixed at my office in the City and County of Denver, this 28th day of June, 1995.

MAC V. DANFORD
Clerk of the Supreme Court

SUPREME COURT, STATE OF COLORADO
No. 93SC554 June 12, 1995

THE STATE OF COLORADO; ROY ROMER, GOVERNOR OF THE STATE OF COLORADO; DEPARTMENT OF ADMINISTRATION, STATE OF COLORADO; and FORREST CASON, EXECUTIVE DIRECTOR, DEPARTMENT OF ADMINISTRATION, Petitioners,

v.

THE FREEDOM FROM RELIGION FOUNDATION, INC., A WISCONSIN NON-PROFIT CORPORATION; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.; JEFF BAYSINGER; HOWARD HUGULEY; GLENN V. SMITH; and LEE WHITFIELD, Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT REVERSED

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JUSTICE SCOTT delivered the Opinion of the Court.
JUSTICE ERICKSON dissents.
JUSTICE LOHR dissents.
JUSTICE KIRSHBAUM dissents.

In this case we must determine whether the content and context of a monument, donated to the State for a secular purpose but containing a message of both religious and secular value, displayed among other monuments and tributes on the grounds of the State Capitol, violate the constitutional provisions prohibiting the establishment of or any preference to religion. We conclude that under the facts of this case they do not.

I

The Freedom From Religion Foundation, Inc., a Wisconsin non-profit corporation, the Colorado Chapter of The Freedom From Religion Foundation, Inc., and several individual citizens (collectively referred to as "respondents"), plaintiffs below, sought removal of a monument of the Ten Commandments located on state property. The trial court found that the monument did not violate the applicable constitutional provisions[1] and the court of appeals reversed. *Freedom From Religion Foundation, Inc. v. State of Colorado*, 872 P.2d 1256 Colo. App. 1993). The State of Colorado, Roy Romer, Governor of Colorado, the Colorado Department of Administration and the Department's executive director (collectively referred to as "State" or "petitioners"), sought review of the court of appeals' judgment, which held that the monument "conveys an essential religious message that would appear to the reasonable observer to be endorsed and approved by the state because of its contents and its location on the property of the state . . . ." *Id.* at 1265. As previously directed by the court of appeals, the trial court applied the legal standard we set forth in *Conrad v. City and County of Denver*, 656 P.2d 662, 672 (Colo. 1983) (*Conrad I*), and ruled the monument does not offend the Establishment

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[1] The two provisions at issue are the Establishment Clause, U.S. Const. amend. I, which provides that "Congress shall make no law respecting the establishment of religion," and our own Preference Clause, Colo. Const. art II, § 4, which prohibits "preference...to any religious denomination or mode of worship."

or Preference Clauses. On review[2] we now apply that standard as enlightened by subsequent Supreme Court decisions, and we accordingly reverse.

II

Although the evidentiary facts presented to the trial court are largely undisputed, they are essential to a complete understanding of this case. Therefore, we reiterate in detail the evidence in the record and the facts derived at trial.

A

In the city of Denver, Colorado, there are adjoining parcels of tree-lined property owned by the State of Colorado and the City and County of Denver. At the east end of the property sits the State Capitol Building and a square block of park. Although a portion of the grounds around the Capitol includes an access street and area for parking, it is landscaped with lawn and trees.

Directly west of the State Capitol Building, across Lincoln

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[2] We granted certiorari in order to decide whether:

1. The court of appeals' opinion engaged in impermissible appellate fact-finding, for instance, in determining the context of the monument [in a State park], contrary to the explicit finding of the trial court.

2. The court of appeals' opinion improperly relied upon school setting cases.

3. The court of appeals' opinion contravenes precedent by concluding that it is axiomatic that the religious nature of the monument [in a State park] makes it unconstitutional.

4. The court of appeals' opinion misapplied the holdings in *Stone v. Graham*, 499 U.S. 39 (1980); *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989); and *Lynch v. Donnelly*, 456 U.S. 668 (1984).

Street, is a one-square-block park, owned by the State, known as "Lincoln Park." Lincoln Park, just south of downtown Denver, is bounded by four highly traveled streets: Colfax Avenue on the north, East Fourteenth Avenue on the south, Lincoln Street on the east, and Broadway Street on the west. Lincoln Park is landscaped with lawn and a number of trees.

The State Capitol Grounds and Lincoln Park make up a three-block area called the "Capitol Complex Grounds." Within the Capitol Complex Grounds are several monuments. On the east side of the Capitol there is a large statue of a Native American and a buffalo which was placed on the grounds in the early 1900s. In front of the Capitol's west entrance is a monument to soldiers who served and died in the Civil War, including a statue of a Union Soldier and two cannons that were used during the Civil War. Other commemorative areas include a bench dedicated as a Pearl Harbor monument and an Aspen grove, comprised of seven trees, that was planted in memory of the Challenger Astronauts who perished in the tragic space shuttle disaster several years ago. There are also numerous arboreal tributes in honor of non-military activities and events ranging from Arbor Day to soil conservation efforts.

Near the center of Lincoln Park at a point where two pedestrian walkways meet, there has been erected a Washington monument-type structure, the Veterans War Memorial. Dedicated to the veterans of all of our nation's wars, that memorial rises to a height of approximately forty-five feet, making it much taller than all of the other monuments and the most prominent structure in the park, with all pathways leading to its base. The Veterans War Memorial is centered on a visual line between the State Capitol Building and the Denver City and County Building.

Throughout Lincoln Park there are several other monuments of various sizes. A statue more than twenty-feet tall stands in the park's northeast quadrant in tribute to a World War II Hispanic Congressional Medal of Honor recipient, J.P. Martinez, and commemorates the

participation of Coloradans of Hispanic descent in that and other wars. The J.P. Martinez Statue is north of the Veterans War Memorial.

South of the Veterans War Memorial in the southeast quadrant of the park stands a replica of the Liberty Bell. Like the original Liberty Bell, the replica contains a phrase in raised letters taken from Leviticus in the Old Testament of the Bible, which reads: "Proclaim liberty throughout the land and unto all the inhabitants thereof."[3] In the northwest quadrant and close to the intersection of Colfax Avenue and Broadway Street is a drinking fountain dedicated to the memory of Sadie M. Likens, who aided war survivors in the early part of this century. Also near the center of the park and across from the Veterans War Memorial near Broadway Street is a flagpole honoring those who served in the military campaign known as the Spanish-American War.

The monument that has spurred this litigation is the Ten Commandments monument, which is located in the northwest quadrant of Lincoln Park, some forty to fifty feet from the intersection of Colfax Avenue and Broadway Street. The Ten Commandments monument is located adjacent to the walkway that runs in a generally northwest-southeast direction across the park. It is approximately fifty feet west of the much larger twenty-foot tall J.P. Martinez Hispanic Veterans Memorial and about thirty feet east of the larger drinking fountain monument.

The Ten Commandments monument is made of stone and is three to four feet high and about two and one-half feet wide. It is sculpted in the form of two tablets. At the top of each tablet is a floral design that surrounds the representation of two other tablets. Inside these latter tablets are symbols which were identified at trial as Phoenician letters but which form no intelligible words in that of any known language. Between the two tablets on this monument is an eye within a triangle -- an "all-seeing eye" similar to that depicted on the

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[3] *The Holy Bible*, King James Version, Lev. 25:10. Respondents did not take issue with this biblical text nor did they seek the removal of the Liberty Bell replica from Lincoln Park.

one-dollar bill. Expert testimony indicates that this Egyptian symbol is generally considered to be secular in nature, although some people view it as representing the eye of God. Immediately below this symbol is an American eagle which is grasping an American flag.

A unique version of the text of the Ten Commandments is immediately below the American flag. It reads as follows:

THE TEN COMMANDMENTS
I AM the LORD thy God

I. Thou shalt have no other gods before me.
II. Thou shalt not take the name of the Lord thy God in Vain.
III. Remember the Sabbath day to keep it holy.
IV. Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee.
V. Thou shalt not kill.
VI. Thou shalt not commit adultery.
VII. Thou shalt not steal.
VIII. Thou shalt not bear false witness against thy neighbor.
IX. Thou shalt not covet thy neighbor's house.
X. Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.

Below this text there are two stars of David, symbols of the Jewish religion, located one in each corner. Between the two stars of David, in the center, are two Greek letters, Chi and Rho, one superimposed upon the other, which is a symbol for the first two letters in the name "Jesus Christ" developed by the early Christian church and still found in many Catholic churches. At the very bottom of the monument appears a scroll with these words:

PRESENTED
BY MEMBERS OF
FRATERNAL ORDER OF
EAGLES
OF COLORADO

B

In 1943, a Minnesota juvenile court judge decided to address what he perceived as a need of many juveniles he had encountered in his court. Believing these juveniles were "without any code of conduct or standards by which to govern their actions," the judge thought "they could benefit from exposure to one of mankind's earliest codes of conduct, the Ten Commandments." He made clear, however, that such exposure "was not to be a religious instruction of any kind." The juvenile judge decided to post a copy of the Ten Commandments in state juvenile courts across the country as part of a nationwide youth guidance program. The judge was of the opinion that the commandments would demonstrate to the youths coming in contact with the juvenile courts that there were long "recognized codes of behavior to guide and help them."

As chair of the Youth Guidance Committee of the Fraternal Order of Eagles (the "Eagles"), the judge presented his ideas to the Eagles for financial support. Initially the Eagles rejected the notion of sponsoring the National Youth Guidance Program because it was felt that such distribution "might seem coercive or sectarian." However, after representatives of the Jewish, Protestant, and Catholic faiths were able to develop a version of the Ten Commandments which was not identified with any particular religious group,[4] the Eagles agreed to support such a youth guidance program.

At the same time, the juvenile judge received a telephone call from motion picture producer Cecil B. DeMille, who was then

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[4] The version agreed upon is the same version which is now inscribed on the monument in Lincoln Park.

producing the movie "The Ten Commandments." Mr. DeMille suggested distributing copies of the Ten Commandments to coincide with the release of the movie. As a promotion of his movie, no doubt, Mr. DeMille suggested that bronze plaques be produced with the Ten Commandments imprinted for distribution throughout the country. Because "the original Ten Commandments were on granite," the judge suggested and DeMille agreed that stone or granite tablets produced by local Minnesota granite companies would be "more suitable." Various local chapters or "aeries" of the Eagles paid for the stone monuments and donated them as part of the youth guidance program to several local and state governments, including Colorado.

Since the monument was placed at Lincoln Park, maintenance costs have been minimal. The State does not allocate funds to maintain the monument; however, the State has used its employees at least once in the past thirty-five years to remove graffiti placed on the monument by vandals and to clean it on occasion.

III

In March of 1989, after Governor Romer refused a written request that the monument be removed from Lincoln Park, the respondents filed this civil action in the District Court for the City and County of Denver alleging a violation of the First Amendment Establishment Clause, U.S. Const. amend. I, and the Colorado Preference Clause, Colo. Const. art. II, § 4, and seeking removal of the monument. Initially the trial court granted summary judgment in favor of the State. However, its ruling was reversed and the case was remanded with directions to consider "the nature of the use to which the particular [p]ublic property is devoted, the nature and purpose of the particular monument, its placement, its proximity to and juxtaposition with other memorials in the same public area, and the nature of the forum and its effect upon the audience to which it is directed" in light of *Conrad I*, 656 P.2d 662 (Colo. 1982), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Freedom From Religion Foundation, Inc. v. State of Colorado*, No. 89CA1937 (Colo. App. Feb. 7, 1991) (not selected for official publication).

On remand by the court of appeals, a trial was held which included the testimony of several lay and expert witnesses as well as documentary evidence. The trial court again entered judgment for the State. Based on the evidence presented, the trial court ruled that although the monument conveyed a message that had both a religious and a secular meaning, the monument was not displayed with any intent to foster the religion of any particular sect. The trial court's determination is consistent with the evidence presented as to the intent of the Eagles and the purpose of their gift to the State, including the testimony of numerous expert witnesses that the Ten Commandments are the basis for many of our secular laws. For example, Gilbert Horn, the Executive Director of the Colorado Council of Churches, testified:

> I don't think you could find a history book anywhere that does not indicate that the same kind of law and moral imperatives contained in the Ten Commandments, which are also contained in the laws and the prescriptions of other world religions, . . . certainly serve a secular purpose in the sense they seek to bind a society together [with] commonly shared values.

Similarly, Dr. Clarence Snelling, Jr., a theology professor, testified as follows:

> The Ten Commandments . . . has been instrumental to the ethical background of quite a number of cultures, and particularly was part of the background of the framers of the United States Constitution, those who wrote the ten amendments to the Constitution. It is very definitely a part of their cultural background. That material not only shows up in their history, but shows up even more so in the general legal background of English Common Law which precedes the North American experience of what we call our Constitutional government and of the Napoleonic Code, which was instrumental in the formation of the legal code from Louisiana west to California. So this material, though of

> a religious source, has functioned as part of the generalized culture ethic for many, many, many generations across hundreds of years to a great extent through all of western Europe and now North America.

Gregory Robbins, a theology expert, testified similarly. The testimony of these experts was undisputed.

The trial court concluded that the monument is one of "a number of monuments," which overall contain symbols of various historic events or concepts associated with American history. Further, the trial court ruled that the monument itself was "a melange of civil, political, cultural, and religious meanings." The trial court concluded that because the monument did not have the overall effect of fostering, preferring, or establishing any religion, its continued existence on state property would not violate the Establishment Clause of the First Amendment or the Preference Clause of our State Constitution.

The court of appeals reversed the trial court's ruling, finding that the monument, as it is presently located and displayed, offends against the controlling constitutional provisions. *Freedom From Religion Foundation*, 872 P.2d at 1256. The court of appeals found that the monument in question was, in fact, "isolated," and that the context under which the monument was displayed by the State did not include several monuments. *Id.* Relying on *Lynch v. Donnelly*, 465 U.S. 668 (1984), the court of appeals then concluded that the "overriding significance" of the text of the monument in its entirety conveys an "essential religious message." *Freedom From Religion Foundation*, 872 P.2d at 1265. The court of appeals held, therefore, that the monument's presence communicates government endorsement of the religious content and is thus unconstitutional. *Id.*

On review, pursuant to the standard set forth by the United States Supreme Court, *see infra*, section IV A, we must determine whether the presence of the Ten Commandments monument on state property communicates a prohibited endorsement or disapproval of

religion. We hold that the monument's content[5] and its setting among several much more prominent monuments in Lincoln Park and throughout the Capitol Complex Grounds sufficiently neutralize its religious character resulting in neither an endorsement nor a disapproval of religion. Accordingly, we reverse the judgment of the court of appeals.

IV

It is a primary principle of the Federal Establishment Clause and our own Preference Clause jurisprudence that one religious denomination cannot be preferred over another; nor can government favor religion over non-religion or non-religion over religion. Article II, section 4, of the Colorado Constitution provides:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. *Nor shall any preference be given by law to any religious denomination or mode of worship.*

Colo. Const. art. II, § 4 (emphasis added). The last sentence of this provision is referred to as the Preference Clause. In interpreting our Preference Clause we have looked to the Establishment Clause of the First Amendment to the United States Constitution and the body of

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[5] By our use of the term "content" we include everything that appears on the face of the monument, including both the language of the Ten Commandments and the surrounding symbols and instructions.

federal cases that have construed it. *See, e.g., Conrad v. City and County of Denver*, 724 P.2d 1309, 1313, 1315 (Colo. 1986) (*Conrad II*) (holding that the main intent or purpose of including a nativity scene in a holiday display on the steps of the Denver City and County Building is to "promote a feeling of good will, to depict what is commonly thought to be the historical origins of a national holiday, and to contribute to Denver's reputation as a city of lights"). Consistent with our precedent set in *Conrad II*, for purposes of review under our Preference Clause we see no need to depart from the path cut by the United States Supreme Court for Establishment Clause cases.

A

The Establishment Clause provides: "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. The Establishment Clause is made applicable to the states by the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). As the Supreme Court has set forth, "'[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.'" *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573, 605 (1989) (quoting *Larson v. Valente*, 456 U.S. 228 (1982)). Nor can government favor religion over non-religion. *Id.* at 593. The natural analog also requires then that we not prefer non-religion over religion. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963)(Goldberg, J., concurring) ("The fullest realization of true religious liberty requires that government. . .effect no favoritism. . .between religion and non-religion."). Furthermore, we must not encourage the government to send a message to members of any religious groups that they are not fully accepted within our greater community. *See generally* Laurence H. Tribe, *American Constitutional Law* 1174 (2d ed. 1988) (hereafter "Tribe"); *see also Thomas Jefferson on Democracy* 108-117 (Saul K. Padover ed., 1939). The Establishment Clause plays a central role in guaranteeing religious freedom "by forbidding official actions that signify official endorsement or exclusion based on an individual's religious beliefs." Tribe at 1187-88.

It takes no more than a moment's reflection, however, to acknowledge that not every public action which indirectly involves religion is unconstitutional. We have adopted the view that a government act which has both a religious and secular message need not, in all instances, fall as a casualty of constitutional scrutiny. *See Conrad II*, 724 P. 2d 1309. This reality was previously stated by the Supreme Court in *Zorach v.Clausen*, 343 U.S. 306 (1952). There, writing for a majority, Justice Douglas suggested:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . .[W]e find no constitutional requirement which makes it necessary for government to be hostile to . . . religious influence.

Id. at 313-14.

The Constitution does not require complete separation of church and state: "[I]t affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the 'callous indifference' we have said was

never intended by the Establishment Clause." *Lynch*, 465 U.S. at 673 (citing *Zorach*, 343 U.S. at 313-14). The *Lynch* Court explained: "In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible." *Id.* at 672.[6] "[O]ur precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Id.* at 683 (O'Connor, J.,concurring). Nonetheless, "'not every law that confers an "indirect," "remote," or "incidental" benefit upon [religion] is, for that reason alone, constitutionally invalid.'" *Id.* (quoting *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)); *see also Widmar v. Vincent*, 454 U.S. 263 (1981) (noting that "a religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion").

In *Lynch*, the Court upheld the display of a creche as part of an overall holiday display.[7] The Court discussed the historical role of religion in American society and concluded that "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. The Court set forth several illustrations of the government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage, including religious exhibits in art galleries and the depiction of Moses and the Ten Commandments in the U.S. Courthouse. *Id.* at 676-77.

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[6] Justice O'Connor spoke of this tension between the language of the clause and our past conduct, recognizing other governmental "acknowledgments" of religion such as government declaration of Thanksgiving as a public holiday and the printing of "In God We Trust" on coins. *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring).

[7] The creche consisted of "the traditional figures, including the infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals...." *Lynch*, 465 U.S. at 671. It is Jesus of Nazareth whom Christians believe to be the Messiah. *See Allegheny County*, 492 U.S. at 579 n.1 (citing 8 *Encyclopedia of Religion* 15, 18 (1987)).

The test for determining whether a governmental act violates the Establishment Clause of the First Amendment was first articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon* the Supreme Court announced a tripartite test for determining whether government action violates the Establishment Clause: "first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13 (citations omitted). "State action violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

Although the tripartite test established in *Lemon* has never been overruled,[8] the Supreme Court has since elaborated upon the second prong of the *Lemon* test -- that the principal or primary effect of the government action must not be either to advance or inhibit religion. This elaboration had its beginnings in the concurrence of Justice O'Connor in *Lynch*. Justice O'Connor opined that whether a government's actions inappropriately advance or inhibit religion under the *Lemon* test depends upon whether these actions reasonably can be interpreted as governmental endorsement or disapproval of religion. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). In order to make that determination, Justice O'Connor suggested that courts must consider (1) what message the government intended to convey; and (2) what message the government's actions actually conveyed to a reasonable person. *Id.* at 690. Justice O'Connor noted that "the meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community." *Id.* Hence, as Justice O'Connor ultimately concluded, both the government's intended message and the message actually given must be secular in nature. *Id.*

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[8] Although there have been cases in which the Supreme Court has avoided using the *Lemon* test, *see, e.g., Lee v. Weisman*, 112 S.Ct. 2649 (1992) (question of whether religious organization could be denied the right to meet in school property after school hours was decided on Freedom of Speech grounds), the Supreme Court has declined the invitation to repudiate it.

Five years later, in *Allegheny County*, the Court embraced Justice O'Connor's refinement of the second prong of the tripartite *Lemon* test. As modified, the appropriate inquiry requires a determination as to whether the suspect government act has "the purpose or effect of 'endorsing' religion." *Allegheny County*, 492 U.S. at 572. Justice Blackmun, writing for a divided Court in *Allegheny County*, noted that Justice O'Connor's concurrence in *Lynch* "provides a sound analytical framework for evaluating governmental use of religious symbols," *id.* at 573, and "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context," *Id.* at 597.

The primary way in which courts have determined the effect of the government action is by focusing on the content of the display and the context in which the questioned object appears. For example, in *Allegheny County*, the Court examined two displays on public property in downtown Pittsburgh, one of a creche standing alone in a courthouse staircase and one of a menorah displayed as part of a larger winter holiday exhibit in front of the City-County building. The creche used words in its portrayal of the nativity scene -- the angel in the creche said "Glory to God in the Highest!" *Id.* at 598. By contrast, the menorah was part of a winter holiday exhibit which included a sign with the words "Salute to Liberty" placed below a Christmas tree. The Court found that the creche display violated the Establishment clause and the menorah display did not. *Id.* at 600.

In evaluating both the content and the context of the creche display, the Supreme Court noted that the creche sends an unmistakable religious message, praising God in Christian terms. The Court concluded that "nothing in the content of the display detracts from the creche's religious message." *Id.* at 598. The Court also noted the physical setting and location of the creche, concluding that it "stands alone; it is the single element of the display on the Grand Staircase." *Id.* The Court then pointed out that the Grand Staircase is "the 'main' and 'most beautiful part of the building that is the seat of county

government." *Id.* at 599. The Court concluded that "no viewer could reasonably think that it occupies this location without the support and approval of the government." *Id.* at 599-600.

The menorah display, on the other hand, was part of a holiday season display which saluted liberty; the Court found that the context of the entire display neutralized the religious dimension of the display. The Court conceded that the menorah is a religious symbol: it serves to commemorate the miracle of oil as described in the Talmud.[9] *Id.* at 613. The Court also noted, however, that the menorah is a symbol of a holiday that, like Christmas, has both religious and secular dimensions. *Id.* The Court held that since the menorah stood next to a Christmas tree and a sign saluting liberty, it created an "overall holiday setting." *Id.* at 614.

B

Several courts have examined the content and context of Ten Commandments displays in evaluating their constitutionality. For example, in *Anderson v. Salt Lake City Corp.*, 475 F. 2d 29 (5th Cir. 1973), under circumstances similar to those present here, the Fifth Circuit Court of Appeals allowed a gift of the Order of Eagles to be displayed on the courthouse grounds. This gift was a granite monument[10] inscribed with the Ten Commandments and other religious and nonreligious symbols much like the monument in the case at bar. The court found that the gift was nothing more than a historically important monument with both secular and sectarian effects. The court held that the monument was being presented primarily for its historical significance and that it would be unreasonable to require removal of the

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[9] The Talmud, an "all-embracing constitution of medieval Jewish life," is an extended, multivolume compilation of rabbinic teachings, including law, morality, and theology. The Hebrew word *talmud* means "study." The original writings, which were substantially supplemented over time, were "completed" by the middle of the fifth century. *See* 14 *Encyclopedia of Religion* 256-57 (1987).

[10] We do not accept the *Anderson* court's use of the term "monolith" in reference to the Ten Commandments monument. *See infra*, p.26 n.16.

monument simply because it reflected the religious nature of an ancient era. *Id.* at 34. *But see Harvey v. Cobb County, Ga.*, 811 F. Supp. 669, 678 (N.D. Ga. 1993) (placement of Ten Commandments alone in alcove of the courthouse, high on the wall, with no countervailing secular passages or symbols, had effect of endorsing religion).

It has been where the display or publication of the Ten Commandments concerns public schools -- where young and impressionable minds are in need of greater protection -- that courts have been less tolerant of the potential to inappropriately persuade or coerce students by religious views. In *Stone v. Graham*, 449 U.S. 39 (1980), for example, vigilance to avoid and protect against coercion properly prevailed over a fear that the prohibition might be hostile to religion. In *Stone*, the United States Supreme Court invalidated a state statute requiring the posting of a copy of the Ten Commandments on public classroom walls. Each plaque bore a notation expressing the purpose was to demonstrate the secular application of the Ten Commandments as the fundamental legal code of western civilization and the common law of the United States. Despite that avowed purpose, the Court concluded the statute served no secular legislative purpose and was therefore unconstitutional. The Court found that "the preeminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature," *id.* at 41, noting that the commandments were not "integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Id.* at 42; *see also Ring v. Grand Forks Pub. Sch. Dist. No. 1*, 483 F. Supp. 272, 274 (D.N.D. 1980) (The purpose is to "display the Ten Commandments of the Christian religion in a conspicuous place in all classrooms. There is not even a pretense of a secular purpose in the statute or in the defendants' compliance with the statute.").

The differences between the *Anderson* monument and the *Stone* and *Ring* displays are significant and make reliance on cases involving the publication of the Ten Commandments in classrooms misplaced. The monuments in *Stone* and *Ring* were placards containing the Ten Commandments of the Christian religion, meant to be placed in a

conspicuous place in all classrooms, where students' attendance is mandatory and frequent, as a means of instilling in students certain values. *Stone*, 449 U.S. at 42; *Ring* 483 F. Supp. at 274. School religion cases require a more stringent analysis because of the age of the minds affected, and because students are captive audiences, especially susceptible to influence. In *Anderson*, however, the monument presented was not associated with any one particular religion, and was not displayed in a location meant to influence the thinking of young children. Rather, the monument was presented primarily for its historical significance. *Anderson*, 475 F.2d at 34.[11] Thus, the analysis applied by the *Anderson* court is more relevant to this case.

Despite the undeniably religious nature of the Ten Commandments,[12] federal courts have generally concluded that if there are countervailing secular passages or symbols in the content of the display or if the context of the display detracts from its religious message, then the display may be constitutional. *See, e.g., Anderson*, 475 F.2d 29; *Harvey*, 811 F.Supp. at 677-78; *see generally Lynch*, 465 U.S. at 683.

V

Following the principles set forth in the *Conrad* cases, and the legal standard set forth in *Lemon* as modified by the United State

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[11] In addition, the *Stone* case involved a legislative act, whereas the *Anderson* case, as here, involved only a single state action.

[12] *See e.g., Stone*, 449 U.S. at 41-42 ("The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath day."); *Harvey*, 811 F. Supp. at 677 ("The Ten Commandments are an integral part of the Jewish and Christian traditions, appearing in the book of Exodus in the Bible or Old Testament.").

Supreme Court in *Allegheny County*, [13] the constitutionality of the Ten Commandments monument in this case will depend upon whether the display has the purpose or effect of endorsing or disapproving of religion. Resolution of that issue will rest in large part on the particular content and physical setting of the monument. *See Allegheny County*, 492 U.S. at 595.

A

Upon consideration of the content of the monument itself, we conclude that it was not erected with the purpose of endorsing religion. The monument at issue here does not reproduce exactly the Ten Commandments as accepted by any particular sect. The text includes symbols of at least two significant religions, Judaism and Christianity,[14] whose teachings are in substantial conflict with each other. We find that the juxtaposition of the Christian Chi and Rho with the Jewish Star of David reflects an acknowledgment of reconciliation and diversity more than any sentiment of intolerance. Between the two tablets is an "all-seeing eye" which has both secular and nonsecular meanings.[15] Dr. Clarence Snelling, Jr. testified that the "eternal eye" contains the pyramid, which is a symbol from Egypt itself, indicating that "it has a different genesis than the three religions that use the Ten Commandments." The monument also has patriotic symbols in the form of an eagle and the flag. Furthermore, the content of the monument is consistent with the stated secular purpose of the donation. The monument was donated as part of the National Youth Guidance

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[13] *Conrad I* was decided prior to the Supreme Court's decisions in *Lynch* and *Allegheny County*.

[14] For purposes of this discussion, we deem it unnecessary to distinguish between the several Christian faiths or denominations.

[15] The expert witnesses agreed that the "all-seeing eye" is most commonly used as a secular symbol, giving its use on the one-dollar bill as an example.

Program, whose purpose was secular in nature.[16] Such secular intent of the donation is logical in light of the historical fact that the Ten Commandments has served over time as a basis for our national law. All the experts who testified at trial agreed that, at least to the extent that the Commandments established ethical or moral principles, they were expressions of universal standards of behavior common to all western societies. It was agreed that these moral standards, as influenced by the Judeo-Christian tradition, have played a large role in the development of the common law and have formed a part of the moral background for the adoption of the national constitution.[17] While

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[16] E. J. Ruegemer, the Minnesota juvenile court judge who conceived of this idea, submitted an affidavit which was accepted into evidence, stating that posting the Ten Commandments was "not to be a religious instruction of any kind," but rather was meant to "show these youngsters that there were such recognized codes of behavior to guide and help them." Judge Ruegemer's statements are consistent with an exhibit admitted during the trial that contained a short article in the July, 1955, edition of the *Denver Eagle*, a publication of the Eagles, announcing the donation of the Ten Commandments monument to the State of Colorado. The article reads in its entirety as follows:

> The Colorado Eagles will donate a monolith to the State containing the ten commandments, to be placed on the Capitol grounds in the next few months. A part of the National Youth Guidance Program, the large marble piece was approved at the Lamar State Convention.

We find the conspicuous absence of any reference to religion by the Eagles and the Eagles' original hesitance to provide the gift out of fear that the organization might be viewed as endorsing religion to be important and consistent with a conclusion that it was given with secular purpose. Finally, we note that if there is any discrepancy in the article or any exaggeration, it is the reference to the monument as a "monolith" and as a "*large* marble piece." (Emphasis added.) Webster's defines "monolith" as "a single great stone often in the form of an obelisk or column" or something "usually having tremendous size or strength." *Webster's Third New International Dictionary* 1462 (1986). Standing three to four feet high and two and one-half feet wide, we find the monument is not a "monolith", is not "large" and that, by its setting, is not even a prominent feature of Lincoln Park.

[17] For example, Gregory Robbins, a theology expert witness for the State, testified that:

> even though there are elements of this monument that are overtly religious, the monument can also be seen to harken back to those

a statement disclaiming any religious purpose perhaps would have provided greater evidence of no intention to promote religion, the existence of such a statement or its absence alone is not determinative.

Finally, the record contains no direct evidence of the State's purpose in accepting the monument because, as found by the trial court, the State has no record of how the monument came to be in Lincoln Park. The record does reflect, however, through the testimony of several state employees, that the State's purpose in accepting any monuments in that park is not to endorse the message depicted in the various monuments, but rather to open the public park up to all different types of groups interested in utilizing the valuable state grounds. Given the State's generally neutral objective in accepting monuments, and absent evidence to the contrary, we presume that the donative intent is also the basis of acceptance. We ascribe to the donee the intent of the donor -- that is, acceptance of the gift by the State, without other evidence, indicates the State's assent to the Eagles' stated secular purpose.

B

The message the object conveys in context is also significant in a determination of whether the display has the effect of endorsing religion, because the context may affect the message a reasonable observer would derive from the setting. As the trial court found, the Ten Commandments monument in this case does not stand alone and is not a conspicuous feature of Lincoln Park. In the immediate vicinity of the Ten Commandments monument are both the much larger Martinez Statue and the larger drinking fountain monument; secular monuments similar to those are also found throughout the Capitol

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> moral languages, those two streams that developed our sense of law, and that it is possible to construe this monument as being a monument to the fact that we as a republic are a people who pay attention to law. . . .I think it is possible to construe [commandments] two through ten as being examples of law that this country has observed from its very beginning.

Complex Grounds. In fact, the Ten Commandments monument is one of the smallest and least conspicuous of the displays in Lincoln Park. Furthermore, it is not displayed in the central or most prominent part of the park which is reserved for two tributes to veterans, the Veterans Memorial and the flag monument. In essence, the monument is found in what is much like a museum setting which, "though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch*, 465 U.S. at 692.

The various monuments found around the park in fact represent a cornucopia of different cultural events and experiences that make up the history of our nation and reflect upon a history that is also Colorado. For example, the J.P. Martinez statue is in tribute to a Hispanic medal of honor recipient and commemorates the military service of Colorado citizens of Hispanic descent; the metal flagpole is dedicated to all citizens killed in the Spanish American War; and the metal reproduction of the Liberty Bell celebrates the freedom upon which this country was founded. This collection of monuments celebrates a history of standing up against oppression, foreign and domestic, and an acknowledgment of the cultural tapestry that is Colorado.[18]

Although displayed on public property, unlike the school setting cases, the monument is not located so as to have a coercive effect. In fact, unlike in *Anderson*, where citizens exercising their right to access the courts or other government benefits might encounter the monument upheld there, here the monument occupies an inconspicuous place where citizens may be found by choice and are not necessarily present for purposes related to government. While the text of the Ten Commandments affixed to a monument would not be appropriately placed on state property standing alone, here the Ten Commandments monument and its countervailing secular text fits within the melange of

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[18] We note here that, within limits that do not send a message that government is hostile towards any identifiable group or that any members of any group are not fully accepted members of our community, the State has a vital interest in preserving and protecting different religious, cultural and ethnic backgrounds and traditions.

historical commemorative accounts found in Lincoln Park.[19] Furthermore, the display of monuments in Lincoln Park teaches a history of rich cultural diversity -- due to our past it would be inaccurate to ignore a history that includes religion.

C

Accordingly, we find that the content and context of the monument negate any suggestion that the government is endorsing religion. We conclude on the record before us that objective viewers would not perceive the monument in its Lincoln Park setting as government endorsing religious belief or suggesting that religion in general is relevant to their standing in the political community.

VI

Establishment Clause cases require highly fact specific scrutiny which must be approached on a case-by-case basis. In *Conrad I* we recognized that analysis of a Preference Clause challenge to a governmental action "is dependent in important part on factual

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[19] As stated in the testimony of Gregory Robbins:

> [I]n religious studies we are very much concerned about things that create sacred space. And that architecture has ways of telling you that this is holy ground, this is sacred space, this is a religious zone, if you will. So, for example, if you enter into a cathedral, the Basilica of the Immaculate Conception, you have holy water, you have multiple symbols that tell you that you have passed from a secular zone, Colfax Avenue, to a sacred zone, to a holy space.
>
> This monument, in the context of the state capitol, which is not supported by other sacred symbols for either the Jewish or the Christian tradition, surrounded as it is by other sorts of memorials, the Vietnam memorial, the cannons, as well as other buildings, there is nothing about this monument that establishes the place around it or the monument as sacred space. There simply is not the supporting symbols, the supporting architectural configuration that would suggest that.

determinations." *Conrad I*, 656 P.2d at 667. The controlling question in this case is what a reasonable observer might fairly understand to be the primary message of the monument, as displayed in its particular setting. We find that, considering the monument and its placement in the park as well as the proximity of other monuments, the Ten Commandments monument is not isolated and, as displayed in Lincoln Park, does not convey a primarily religious message.

The determination of whether the monument has the purpose or effect of endorsing religion also involves questions of law. In its review, the trial court did not apply the *Lemon* test as set forth in *Allegheny County*; however, after applying that test to the undisputed evidence and the findings set forth by the trial court, we find that the trial court reached the correct result. We believe it would result in the very callous indifference suggested by Justice Douglas in *Zorach* to exaggerate the effect of benign religious messages by suggesting they automatically inculcate religion. The flaw of such a result would be to assume improper motive and to credit inappropriate religious involvement by the State in every message of historical or solemn significance in which religious precepts may also be attributed to the words and symbols used. Under our Establishment and Preference Clause jurisprudence, any religious meaning of legal consequence must ultimately flow from the character of the state action as perceived by an objective observer, but does not turn on whether the message, though secular, also has religious value. We conclude that applying the objective observer test under the particular circumstances before us today, such a predominant religious character is not intuitively obvious. Nonetheless, while we are to be vigilant to bar state conduct that results in the establishment of religion, we are not to engage in an exercise intended to require government to prefer non-believers over believers.

Judicial review of Establishment and Preference Clause cases does not begin and end with a determination that the offending conduct includes a message of religious value. If that were the case, the result in *Conrad I* and *Conrad II* could not stand in the face of an inquiry declined to determine whether the creche, standing alone, sends a religious message. Moreover, if such an examination were the standard

by which to apply our First Amendment jurisprudence, then Congressional prayer, the cry of the Clerk of the Supreme Court[20] and setting aside secular holidays such as Thanksgiving or Christmas could not withstand scrutiny.[21]

VII

Accordingly, applying the legal standard set forth in *Lemon* as modified by *Allegheny County*, we find that the preeminent purpose of erecting the monument was not plainly religious in nature -- rather, the monument represents the secular objective intended at the outset, recognition of a historical, jurisprudential cornerstone of American legal significance. Moreover, the content and context of the display do not convey a message that any person is excluded from our political community based on religious beliefs or the lack of such beliefs.[22] Thus, we conclude that the Ten Commandments monument does not have the purpose or effect of endorsing religion, nor does it suggest the State's disapproval of any religious or non-religious choices protected by our Federal and State Constitutions. For the foregoing reasons, we reverse the judgment of the court of appeals.

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[20] Upon opening each session of the United States Supreme Court, the Clerk announces, "God save the United States and this Honorable Court."

[21] Because of their "history and ubiquity," such government acknowledgments of religion are not understood as conveying government approval of particular religious beliefs. See *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring.)

[22] We do not question the motives of the respondents, and in no way do we doubt the sincerity and strength of their convictions. We note only that the test to be applied is not a subjective one. As the United States Supreme Court stated in *Lynch*, 465 U.S. at 690: "The meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community." In this case the evidence points to the secular intent of the speaker and the objectively viewed secular message conveyed. As stated more recently by the Supreme Court while striking down certain state conduct implicating religion under the Free Speech Clause of the First Amendment, '[w]e do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive.' *Lee*, 112 S.Ct. at 2661.

JUSTICE ERICKSON dissents. JUSTICE LOHR dissents. JUSTICE KIRSHBAUM dissents.

State of Colorado v. The Freedom From Religion Foundation, Inc., No. 93SC554

Justice Erickson dissenting:

In my view, a new trial is necessary because the First Amendment Establishment Clause tests announced in this opinion by the majority for the first time were not followed by the trial court. I agree with Justice Lohr 's analysis of the First Amendment and would join his dissent if he required that a new trial be granted. I agree with Justice Kirshbaum's conclusion in his dissent that a new trial is required to properly determine the issues in accordance with the First Amendment standards set in this case.

JUSTICE LOHR, dissenting:

We granted certiorari to review the Colorado Court of Appeals' decision in *Freedom From Religion Foundation, Inc. v. State of Colorado*, 872 P.2d 1256 (Colo. App. 1993), reversing the trial court and holding that the Ten Commandments monument located in Lincoln Park near the State Capitol violated the Establishment Clause of the First Amendment to the United States Constitution and the Preference Clause of the Colorado Constitution.[1] The majority in turn reverses the court of appeals and finds the monument constitutional. To do so, the majority must define the applicable constitutional standard. It states that the proper constitutional inquiry is whether the monument "communicates a prohibited endorsement or disapproval of religion." Maj. op. at 12. In addition, to be constitutional, the monument may not send a message to individuals that religion is relevant to their standing in the political community. Maj. op. at 15, 31. To interpret the monument's message, the majority focuses on the content of the Ten Commandments monument and the context in which the monument appears. *See* maj. op. at 20. The majority concludes that the Ten Commandments monument does not send a message of government endorsement of religion. Maj. op. at 31. Rather, according to the majority, the Ten Commandments monument is simply commemorative of the history and cultural diversity of Colorado.[2] *See* maj. op. at 29-30. Thus, the majority holds that despite the religious content of the Ten Commandments monument, the monument is constitutional. I agree with the majority that the proper inquiry is whether a

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[1] U.S. Const. amend. I; Colo. Const. art. II, § 4.

[2] In addition, the majority holds that the State of Colorado did not place the Ten Commandments monument on the grounds of the State Capitol with the intent to endorse religious beliefs. Maj. op. at 28. As I do not dispute the majority's conclusion and because the government's stated purpose for erecting the monument does not have any bearing on the inquiry into the objective message the monument may communicate to an observer, this dissent does not address the issue. *See infra* p. 8 and n.2.

governmental display of religious objects conveys a message of governmental endorsement of religion or communicates to individuals that religion is relevant to their standing in the political community. In addition, I agree that the context in which the monument appears is a central factor in the analysis of this question. However, I disagree with the majority's application of the "endorsement" test and its conclusion that the other monuments in Lincoln Park neutralize the inherently religious nature of the Ten Commandments monument. Therefore, I respectfully dissent.

I.

I adopt the majority's rendition of the relevant facts in section II of the opinion. I set forth independently, however, the pertinent federal case law regarding freedom of religion issues.[3]

A.

The Establishment Clause of the First Amendment of the United States Constitution provides, "Congress shall make no law respecting an establishment of religion . . . . " U.S. Const. amend. I. This clause is applicable to the states through the Fourteenth Amendment. *See* U.S. Const. amend. XIV and *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The United States Supreme Court has interpreted the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization. *Allegheny*

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[3] The Preference Clause of the Colorado Constitution is considerably more specific than the Establishment Clause of the United States Constitution. *Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072, 1081 (Colo. 1982); *see also* maj. op. at 14. However, we have recognized that the Preference Clause and the Establishment Clause embody the same values of free exercise and government noninvolvement in religious issues. *Americans United*, 648 P.d. at 1081. Thus, we have looked to the body of federal case law interpreting the First Amendment to the United States Constitution for guidance when considering Preference Clause issues. *Conrad v. City and County of Denver*, 656 P.d. 667, 670-71 (Colo. 1983). For purposes of resolving this case, I do not find it necessary to consider the Preference Clause apart from Establishment Clause jurisprudence.

County v. American Civil Liberties Union, 492 U.S. 573, 590 (1989). Government may not officially prefer one religious creed or denomination over another. *Id.* at 605; *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring). Nor may government favor religion over non-religion. *Allegheny County*, 492 U.S. at 593; *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 27-28 (1989)(Blackmun, J., concurring) ("government may not favor religious belief over disbelief" or adopt a "preference for discrimination of religious ideas"); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963)(Goldberg, J., concurring)("The fullest realization of true religious liberty requires that government. . .effect no favoritism among sects or between religion and non-religion").

As the majority notes, these principles do not require complete separation of church and state where governmental isolation would unnecessarily burden or hinder an individual's ability to worship freely. *See* maj. op. at 16. For example, in *Zorach v. Clauson*, 343 U.S. 306 (1952), the Supreme Court upheld a public school policy, established pursuant to statute and regulation, that released students from school so that they could attend religious instruction classes away from school property. The Court reasoned that the school was merely accommodating the needs of those seeking religious instruction rather than encouraging or compelling students to participate. *Zorach*, 343 U.S. at 311. The Court held that the First Amendment permitted accommodation of the students' religious needs.[4] *Id.* at 314. Thus, the First Amendment allows government to accommodate the religious nature of its people as long as its actions neither interfere with the free

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[4] In *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948), the Supreme Court invalidated a school policy that freed public school students from some hours of required school work on condition that they attend religious classes within the school building. In *Zorach*, the court distinguished *McCollum* by stating:

> In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. *Zorach*, 343 U.S. at 315.

exercise of religion nor impermissibly establish religion.[5]

Accommodation, however, does not justify placement of religious objects on government ground. *Allegheny County*, 492 U.S. at 601 n. 51. Denying a particular sect placement of their religious objects on government ground does not burden the ability to worship. It may deprive the members of a particular sect of the benefit of seeing government adopt the sect's religious message as its own. This, however, is precisely what the Establishment Clause prohibits. *Id.* Government does not demonstrate callous indifference to religion by abstaining from endorsing particular religious objects or ideas. On the contrary, by remaining neutral with respect to the religious beliefs of its people, government ensures that all individuals may worship freely or not at all.

B.

The Supreme Court of the United States articulated the test for determining whether a statute violates the Establishment Clause in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Supreme Court stated:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster "an excessive government entanglement with religion."

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[5] While the First Amendment allows government to accommodate religious beliefs, it does not require accommodation in all circumstances. The Supreme Court of the United States has held that although the First Amendment allows government to enact religious practice exemptions to religiously neutral laws of general applicability, it does not compel governments to do so. *Employment Division v. Smith*, 494 U.S. 872, 890 (1990)(government not required to enact religious use exemption to general criminal law banning use of peyote). Governments may require individuals to comply with neutral laws of general application even if the laws conflict with the individual's sincerely held religious beliefs. *Id.* at 879-82; *see, e.g., United States v. Lee*, 455 U.S. 252, 258-61 (1982) (Amish employer not exempt from paying social security taxes on ground that Amish faith prohibited participation in governmental support programs).

Lemon, 403 U.S. at 612-13 (citations omitted.) This test has since been utilized to evaluate governmental actions as well as statutes.[6] *See, e.g., Lynch v. Donnelly*, 465 U.S. 668 (1984). Failure to satisfy any one of these three prongs results in a violation of the Establishment Clause. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987); *Stone v. Graham*, 449 U.S. 39, 40-41 (1980) (per curiam).

The Supreme Court's decisions since *Lemon* have further delineated the scope of the "effect prong" of the *Lemon* test. *Lynch*, 465 U.S. at 689 (O'Connor, J., concurring) ("[f]ocusing on... endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device"). The Court has scrutinized governmental practices vigilantly to determine whether they have the primary purpose or effect of "endorsing religion," thereby contravening the First Amendment. *Allegheny County*, 492 U.S. at 593; *Whitters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 489 (1986) (holding that extending assistance under a state vocational rehabilitation program to a blind person attending a religious institution did not convey any message of state endorsement of religion and was not unconstitutional); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 391 (1984) (holding that close identification between government powers and responsibilities and those of any religion conveys a message of endorsement that violates a core tenet of the Establishment Clause); *see generally* Laurence H. Tribe, *American Constitutional Law* 1224 (d. ed. 1988) (describing meaning and use of the endorsement test).

Impermissible endorsement of religion includes government promotion of one religious belief system over another. *Edwards*, 482 U.S. at 593. In addition, under the endorsement test, it is unconstitutional for the state, through its actions, to make adherence to

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[6] The Supreme Court has not used the *Lemon* test exclusively when evaluating and deciding Establishment Clause cases. Maj. op. at 18 n. 8; *see e.g. Marsh v. Chambers*, 463 U.S. 783 (1983). However, as the majority notes, the Supreme Court has not repudiated the use of the *Lemon* test. *Id.* At present, the *Lemon* test remains both a useful analytical tool for evaluating the constitutionality of public displays and a central tenet of Establishment Clause jurisprudence.

religion relevant in any way to a person's standing in the political community. *Allegheny County*, 492 U.S. at 594; *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring). Endorsement "sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J.,concurring).

In evaluating governmental displays of religious objects, the primary question is what "viewers may fairly understand to be the purpose of the display."[7] *Allegheny County*, 492 U.S. at 595 (opinion of Blackmun, J.); *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). This inquiry is shaped by consideration of the religious object itself, as well as of the context in which the object appears. *Allegheny County*, 492 U.S. at 595 (opinion of Blackmun, J.). Context is significant because it may affect the message a reasonable observer would derive from the scene. *See id.* Thus, context could negate any suggestion that government is endorsing religious beliefs or particular religious choices.

C.

In summary, when evaluating state-sponsored displays of religious objects, a court must determine whether the display has the

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[7] As the majority explains, the inquiry regarding the effect prong of the *Lemon* test is completely separate from that of the purpose prong. *See* maj. op. at 19. Under the purpose prong, courts consider what message the government intended to convey. Under the effect prong, courts must consider the message actually conveyed to a reasonable person. It is necessary to consider the objective message because some viewers may not have access to evidence of intent. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring.) For these viewers, the message actually conveyed may be something not actually intended. *Id.* Therefore, courts when determining the constitutionality of governmental displays of religious objects must consider the objective meaning of the display wholly apart from the government's purpose for erecting the display. (Thus, in this case, the fact that both the Fraternal Order of Eagles and the Colorado State Government had a secular purpose in erecting the Ten Commandments monument should not affect consideration of the effect of the monument's objective message. *See* maj. op. at 25-28.).

purpose or effect of endorsing religion. When making this determination, the court first must consider the object itself. Second, the court must consider whether the context in which the object appears changes or alters the object's message. Finally the court must determine whether a reasonable observer would perceive the object in context as endorsing religious belief or suggesting that religion in general is relevant to the observer's standing in the political community.

II.

A.

The Ten Commandments monument is an inherently religious symbol that has the primary effect of endorsing religion. The prominence of the religious message is best understood by viewing the picture of the monument itself, attached as an appendix to this opinion. The text dominates the monument. The words "I AM the LORD thy God" are written at the top of the text and in larger letters than the commandments themselves. *See* maj. op. at 7 and appendix. In addition, the first three commandments instruct followers to "have no other gods before me," to "not take the name of the Lord thy God in vain," and to "Remember the Sabbath day to keep it holy." *Id.* These commandments are primarily religious in nature and a foundation of Judeo-Christian theology. In *Stone*, the United States Supreme Court described the inherently religious nature of the Ten Commandments:

> The Ten Commandments are *undeniably a sacred text* in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters . . . . Rather, the *first part of the Commandments concerns the religious duties of believers*: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.

449 U.S. 39, 41-42 (1980) (citations and footnote omitted and

emphasis added).[8] Given the irrefutably sacred meaning of the text of the monument, a reasonable observer would consider display of this text to be an endorsement of religion.[9] In addition to the commandments themselves, the monument has the religious symbols of a Chi Rho, the Latin symbol for Christ, and two Jewish Stars of David engraved upon it. These symbols further enhance the monument's endorsement of religion. That these symbols represent both Christianity and Judaism does not neutralize the monument's message of endorsement. As Justice Blackmun noted in *Allegheny County*, the "simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone." 492 U.S. at 615. Representation of multiple religious sects accentuates rather than ameliorates the overall religious message of the monument.[10] Because it is unconstitutional for government to favor religion over non-religion, it is not necessary to find that the monument advances a particular religion in order to find the monument unconstitutional.

Although the monument has secular symbols on it, most prominently an American flag and an eagle, these symbols do not detract from the overall religious message of the monument. On the

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[8] The Supreme Court in *Stone* evaluated the constitutionality of a statute requiring the posting of a copy of the Ten Commandments on the wall of each public elementary and secondary school classroom. The Court held that the statute was unconstitutional because the posting had no secular purpose, notwithstanding the legislative requirement that each display contain a notation that "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States. *Stone*, 449 U.S. at 39-40 n.1 (quoting Ky. Rev. Stat. § 158.178 (1980)).

[9] The majority agrees with the conclusion that "standing alone," display of the text of the Ten Commandments would be unconstitutional. Maj. op. at 30 (emphasis in original). Thus, the majority finds the Ten Commandments monument constitutionally acceptable only because it concludes that the secular material on the monument taken together with the other monuments within Lincoln Park neutralize the religious import of the Ten Commandments monument.

[10] Likewise, the fact that the monument does not reproduce the Ten Commandments as accepted by any particular sect does not lessen the monument's message of endorsement of religion over non-religion.

contrary, the juxtaposition of these uniquely American symbols with the religious content of the text and the religious symbolism on the monument serves to enhance the message of endorsement. By invoking reference to the United States government, these symbols send a message to non-adherents of the western religions represented that they do not enjoy full standing in the political community. This is exactly what the First Amendment prohibits.

B.

Given the inherently religious nature of the Ten Commandments monument itself, I next consider whether the context of Lincoln Park neutralizes the monument's message of endorsement. As the majority explains, Lincoln Park and the greater capitol grounds contain a wide variety of memorials, statues, and monuments. *See* maj. op. at 4-6. Located in the immediate vicinity of the Ten Commandments monument is a statue of J.P. Martinez commemorating the participation of Coloradans of Hispanic descent in war, and a drinking fountain monument.[11] The tall Veterans War Memorial is near the center of the park, and a replica of the Liberty Bell is located across the park from the Ten Commandments monument. Other monuments are situated at various locations in the park. *See* maj. op. at 4.

The majority holds that these monuments create a "museum setting" which negates any message of endorsement. Maj. op. at 29. These monuments, however, commemorate a diverse array of events and individuals. There is little thematic connection between them and the Ten Commandments monument. While the other monuments commemorate actual historical events in American history, the Ten Commandments monument does not.[12] Moreover, the monuments are

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[11] The drinking fountain monument is dedicated to the memory of Sadie M. Likens who aided war survivors in the early part of this century. See maj. op. at 6.

[12] The majority states, "[T]he Ten Commandments monument and its countervailing secular text fits within the melange of historical commemorative accounts found in Lincoln Park." Maj. op. at 30. It is unclear from the majority opinion what secular historic event the Ten Commandments monument is celebrating. To the extent the Ten

displayed independently and do not create a cohesive unit. Thus, an observer would have little indication that the meaning of the Ten Commandments monument is related to the meaning of the other monuments in Lincoln Park. Likewise, the state has not accompanied the Ten Commandments monument display with a statement of purpose explaining the intended message of the monument as it relates to the other monuments within Lincoln Park.[13] Because the other monuments neither relate to nor secularize the meaning of the Ten Commandments monument, a reasonable observer would not understand the undeniably religious message of the Ten Commandments monument to be neutralized by the monument's setting.

The majority suggests that the collection of monuments within Lincoln Park "celebrates a history of standing up against oppression, foreign and domestic, and an acknowledgment of the cultural tapestry that is Colorado." Maj. op. at 29. However, the Ten Commandments monument does not represent the fight against oppression and is not related to commemoration of our nation's involvement in various wars. In addition, a diverse group of peoples and religions -- not limited to the persons of the Christian and Jewish faiths -- have contributed to the "cultural tapestry that is Colorado." It is unclear how a reasonable viewer would understand a monument surrounded by war memorials and representing only Judaism and Christianity to be a commemoration of Colorado's cultural history.[14]

Commandments represent the belief of Jews and Christians that God provided humans with a moral code by which to live, the monument is endorsing and extolling a particular religious belief and perspective. This is unconstitutional.

[13] Where the secular meaning of a display is clear to a reasonable viewer, it may not be necessary for government to provide an explanation for the display's existence. However, where the religious meaning of a display is paramount, an explanation of meaning or purpose may neutralize any message of endorsement. *But see Stone*, discussed *supra* at n.8.

[14] I do not deny that the Ten Commandments could symbolically represent the origin of law within our culture. *See* maj. op. at 21. Perhaps one could ascribe a secular cultural meaning to all religious objects in that religion is as much a cultural and social phenomenon as a sacred one. The constitutional issue, however, is not whether an

As further support for its conclusion that the religious message of the Ten Commandments monument is neutralized by context, the majority notes the monument's small size and inconspicuousness in relation to the other monuments in Lincoln park. *See* maj. op. at 28. It would seem the majority is intimating that government may endorse religion if the message is conveyed in a modest or inconspicuous way. I disagree.

Size may be a factor when evaluating the meaning of a display. In *Allegheny County*, the city displayed a forty-five foot Christmas tree next to an eighteen foot menorah during the winter holiday season.[15] 492 U.S. at 587. The Supreme Court determined that because the Christmas tree, a secular symbol representing Christmas, was the predominant element in the display, viewers would consider the entire display to be a secular celebration of the holiday season. *Id.* at 617. Size was relevant to the determination of the predominant message of the Christmas tree/menorah display. Thus, size may determine the primary meaning of the display when secular and religious messages are juxtaposed.

However, size does not determine an object's constitutionality. A small object standing alone that has the primary effect of endorsing religion would be unconstitutional. A small encroachment upon our First Amendment values cannot be tolerated. As eloquently stated by Justice Clark, "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent. . . ." *Abington*, 314 U.S. at 225. Thus, because I have concluded that an objective viewer would not consider the Ten Commandments to be connected to the other monuments within Lincoln Park, the relatively small size and inconspicuousness of the Ten Commandments monument in relation to

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objective viewer could derive any secular meaning from viewing the Ten Commandments monument. Rather, the question is what primary message is conveyed by the monument. The majority has not persuaded me that the secular messages it associates with the Ten Commandments monument are the primary ones that a reasonable observer would derive.

[15] The display also included a sign saluting liberty.

the other monuments in the park is of little significance.

The majority further suggests that because the Ten Commandments monument does not have a coercive effect on those viewing the monument, the monument is constitutional. *See* maj. op. at 29. This statement misconstrues the endorsement test. The relevant constitutional inquiry is not whether a governmental display of religious objects coerces the citizenry to take part in religious activity. Rather, the issue is whether the display endorses religion or makes religion relevant to an individual's standing in the political community. While undoubtedly a display exhibiting a coercive effect would be unconstitutional, the endorsement test does not require coercion as a condition to a determination of unconstitutionality. *See, e.g., Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 786 (1973)("[W]hile proof of coercion might provide a basis for a claim under the Free Exercise Clause, it [is] not a necessary element of any claim under the Establishment Clause").

The United States Supreme Court specifically repudiated an Establishment Clause standard that prohibits only coercive practices or overt efforts at proselytization. *Allegheny County*, 492 U.S. at 609. The Court rejected this test as inconsistent with its long practice of applying strict scrutiny to practices suggesting a denominational preference. *Id.* at 608-09. The purpose of the Establishment Clause is to protect the religious liberty and respect the "religious diversity of the members of our pluralistic political community." *Id.*, at 628 (O'Connor, J., concurring). Proscribing only coercive practices would fail to take account of the many more subtle ways "government can show favoritism to particular beliefs or convey a message of disapproval to others." *Id.* at 627-28. Thus, to the extent the majority contends that the Ten Commandments monument is constitutional because the monument does not have a coercive effect, the majority is incorrect.

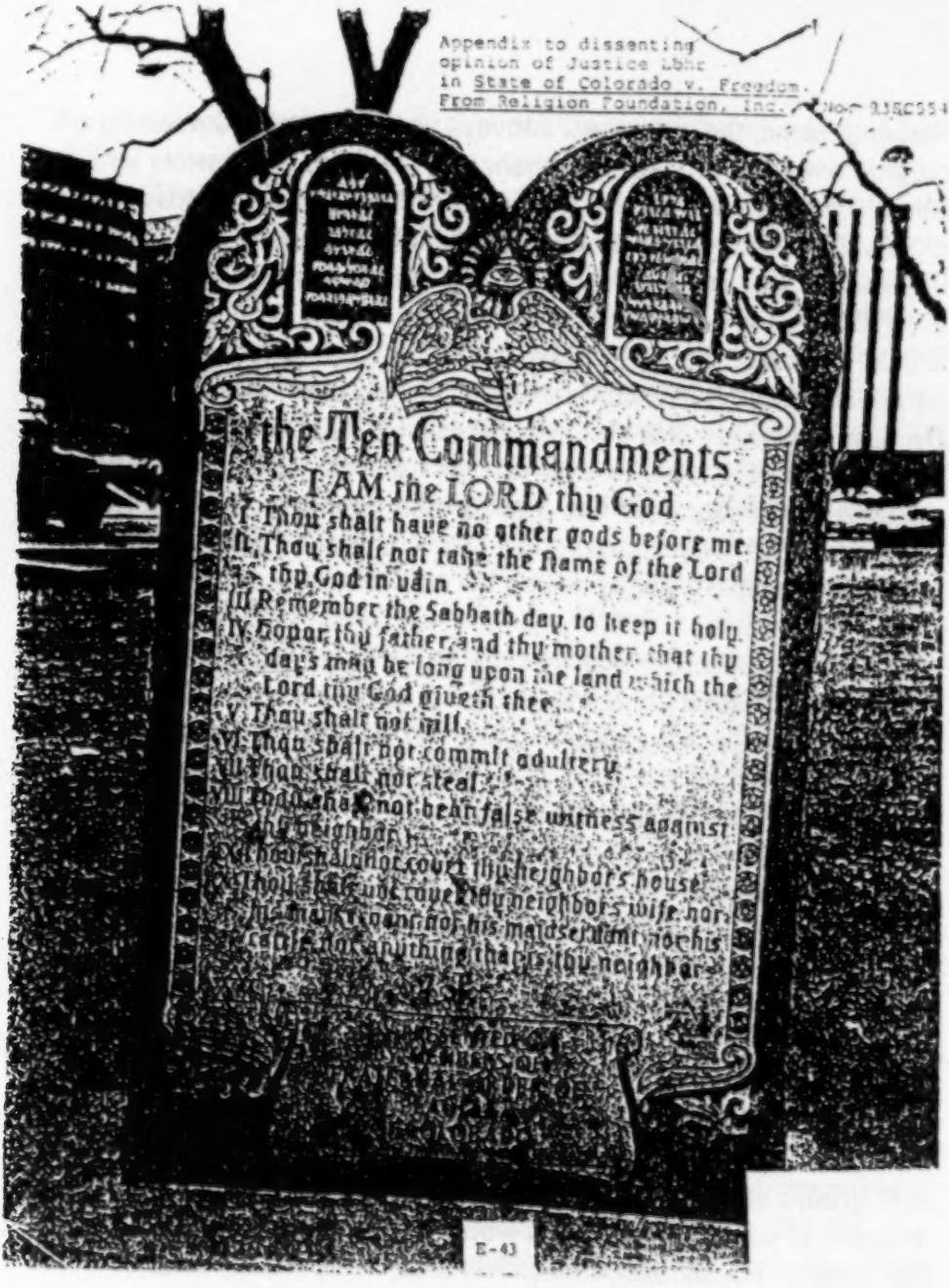
C.

In conclusion, the Ten Commandments monument represents particular religious beliefs and is an inherently religious object.

Standing alone, the monument conveys governmental endorsement of religion over non-religion. Furthermore, the other monuments within Lincoln Park do not neutralize this endorsement effect. A reasonable observer would not consider the primary meaning of the Ten Commandments monument to be one that commemorates cultural diversity within Colorado or the adoption of law within the United States. Rather, the monument primarily celebrates adherence to particular religious beliefs common to Judaism and Christianity. Because I conclude that this message impermissibly endorses religion by sending a message to non-believers and to adherents of other religious faiths that they are less favored members of the political community, I would hold the Ten Commandments monument unconstitutional.

This conclusion does not prefer the interests of non-believers over those of believers. *See* maj. op. at 32. As Justice Blackmun wrote for the court in *Allegheny County*, "A secular state, it must be remembered, is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed." 492 U.S. at 610. A monument professing atheistic values or encouraging the public to renounce their private religious beliefs would be as unconstitutional as the Ten Commandments monument at issue in this case. Governmental silence with regard to religious beliefs ensures that neither believers nor non-believers are favored. In this way, religion is relegated to the realm of private conscience so that all individuals may worship or not free from governmental interference. Therefore, rather than preferring non-believers over believers, holding the Ten Commandments monument to be unconstitutional would treat both groups equally and would ensure an environment of government neutrality in which all individuals would have the freedom to believe as they please. For the above stated reasons, I respectfully dissent.

Appendix to dissenting opinion of Justice Lohr in State of Colorado v. Freedom From Religion Foundation, Inc., No. 03SC554



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Justice Kirshbaum dissenting.

In this case of first impression,[1] the majority holds that the state may permanently display a religious text indelibly associated with the religions of Judaism and Christianity in a public park. The majority also has determined that although the trial court applied an erroneous legal standard and the parties conducted the trial under a false apprehension of the controlling legal principles, this court should resolve the significant questions here presented on the basis of its review of the evidence adduced at trial. I find the initial conclusion to be contrary to the Establishment Clause jurisprudence developed by the United States Supreme Court and contradictory to the principles of the Preference Clause of article II, section 4, of the Colorado Constitution. In view of the significance of the issues here presented, the importance of the evidentiary portion of this case to those issues, and the interests of the parties, I conclude that the case should be remanded to the trial court for a new trial. I therefore respectfully dissent from the majority's opinion.

I

Initially, I must take exception to the majority's description of the issue before this court. The majority describes that issue as follows: "whether the content and context of a monument, donated to the State for a secular purpose but containing a message of both religious and

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[1] We have considered challenges to the temporal and seasonal display of a creche in a Christmas holiday setting based on the protections afforded by the Establishment Clause of the First Amendment to the United States Constitution and the Preference Clause of article II, section 4, of the Colorado Constitution. *Conrad v. City and County of Denver*, 724 P.2d 1309 (Colo. 1986); *Conrad v. City and County of Denver*, 656 P.2d 662 (Colo. 1983). However, we have not heretofore considered challenges to a permanent display of a religious object on state-owned and state-maintained property. The difference is significant. *See Allegheny County v. American Civil Liberties Union*, 492 U. S. 573, 608 n. 56 (1989).

secular value, displayed among other monuments and tributes on the grounds of the State Capitol, violate the constitutional provisions prohibiting the establishment of or any preference to religion." Maj. op. at 2. In my view this statement assumes the resolution of certain critical issues that must be determined to decide the merits of this civil action. The constitutional question is not whether the "content and context" of the Ten Commandments monument violate constitutional prohibitions. The issue we agreed to resolve is whether the state's conduct in electing to display permanently the Ten Commandments monument in a public park violates Establishment Clause or Preference Clause principles. Furthermore, the statements that the monument contains "a message of both religious and secular value" and is "displayed among other monuments and tributes on the grounds of the State Capitol" constitute ultimate factual findings that were not made by the trial court and, as the court of appeals' opinion reflects, are subject to dispute.[2]

The formulation of the issues before us assumes added significance in view of the procedural posture of this case. As the majority notes, the trial was conducted pursuant to an order of remand issued by the court of appeals in 1991. Maj. op. at 10. The court of appeals directed the trial court to make certain findings of fact in light of the opinion of this court in *Conrad v. City and County of Denver*, 656 P.2d 662 (Colo. 1982)(*Conrad I*), and the opinion of the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The court of appeals did not direct the trial court to consider any Establishment Clause or Preference Clause cases decided subsequent to our decision in *Conrad I*, and the trial court's order mentions no case other than those two.

In its opinion in this case, the court of appeals recognized, as does the majority, that the *Lemon* test has been significantly modified by the Supreme Court's decisions in *Allegheny County v. American*

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[2] The trial court did not find that there were "tributes" on the grounds of the State Capitol. The trial court did find that there is a secular "meaning" to many of the commandments and that the commandments "are certainly a basis for our Bill of Rights and our Constitution."

Civil Liberties Union, 492 U.S. 573 (1989), and *Lynch v. Donnelly*, 465 U.S. 668 (1984). *Freedom From Religion Found., Inc. v. State of Colorado*, 872 P.2d 1256, 1262-63 (Colo. App., 1993). As the majority also recognizes, the trial court did not apply the appropriate legal criteria. Maj. op. at 31-32. The court of appeals then applied the tests established by the Supreme Court in *Lynch* and *Allegheny County* to the facts found by the trial court, to certain portions of the evidence in the case, and to its own determination that the Ten Commandments monument is "physically isolated" from other monuments located in Lincoln Park. *Freedom From Religion Found., Inc.*, 872 P.2d at 1264. The majority applies the tests established in *Lynch* and *Allegheny County* to certain facts found by the trial court, to certain portions of the evidence in the case, to its resolution of certain conflicting evidence in the case, and to its determination that the Ten Commandments monument is not isolated from other monuments located on the Capitol grounds. The court of appeals and the majority may of course elect to resolve the issues in this case by applying the applicable legal standards to the findings of the trial court and to undisputed facts established by the evidence. In my view, neither the court of appeals nor the majority is able to perform that appellate function in this case in view of the paucity of specific trial court findings, the conflicting nature of much of the testimony at trial, and the fact that in presenting their evidence at trial the parties were limited by their justifiable assumption that the legal issues to be resolved were framed only by the legal standards articulated in *Conrad I* and *Lemon*.

I agree that the criteria applicable to this case must be derived from cases decided subsequent to *Conrad I* and *Lemon*. I also agree that the trial court did not apply such criteria. I conclude, however, that the parties were in effect misled by the directive given by the court of appeals in its 1991 remand order with respect to what criteria were applicable to the constitutional questions raised by the pleading. In view of these circumstances, the case should be remanded to the trial court for a new trial. The parties should be permitted to litigate the significant constitutional issues raised by the state's election to permanently display the Ten Commandments monument in a public

park with an understanding of the legal criteria this court determines to be applicable to such question.

II

In granting the state's petition for certiorari review of the court of appeals' judgment we agreed to answer the following four questions:

> 1. Did the [court of appeals'] opinion engage in impermissible appellate fact-finding, for instance, in determining the context of the monument [in a State park], contrary to the explicit finding of the trial court?
>
> 2. Did the [court of appeals'] opinion improperly rely on school setting cases?
>
> 3. Did the [court of appeals'] opinion contravene precedent by concluding that it is axiomatic that the religious nature of the monument [in a State Park] makes it unconstitutional?
>
> 4. Did the [court of appeals'] opinion misapply the holdings in *Stone v. Graham*, 492 U.S. 39 (1980); *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989); and *Lynch v. Donnelly*, 456 U.S. 668 (1984)?

In essence, we agreed to determine whether the court of appeals erroneously engaged in appellate fact-finding or improperly applied controlling jurisprudence to the factual circumstances of this case. Although the majority recognizes that these questions are before us, maj. op. at 3 n. 2, it does not directly answer them. I conclude that all of these questions should be answered in the negative.[3]

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[3] The court of appeals pointed out that although the conduct of the state in displaying the Ten Commandments monument violates Establishment Clause prohibitions, the trial court was at liberty to fashion remedies short of removing the monument. *Freedom*

A

The Establishment Clause of the First Amendment to the United States Constitution, applicable to state governmental conduct by means of the Fourteenth Amendment to that Constitution, prohibits state governments from engaging in conduct that may reasonably be perceived by adherents of a particular religion or by non-adherents of religion as endorsing any particular religion or religions or endorsing religion in general over non-religion. *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573, 592 (1989);[4] *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1984); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring); *see Larson v. Valente*, 456 U.S. 228, 244-46 (1982). The Preference Clause of article II, section 4, of the Colorado Constitution prohibits this state's government from engaging in conduct that may reasonably be perceived to prefer any particular religion or religions or religion in general. Colo. Const. art. II, § 4; *Conrad I*, 656 P.2d 662, 670-71 (1983).

The primary question in this case of first impression is whether the election by the state of Colorado to install and permanently maintain a monument containing symbols of special significance to adherents of Christian and Jewish religious denominations in a public park violates either or both of these constitutional provisions. The trial court, purporting to apply criteria articulated by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), held that the state's conduct violated neither constitution. The court of appeals concluded that the state's conduct violated the Establishment Clause under the criteria articulated by the Supreme Court in *Lynch* and *Allegheny County*. The majority acknowledges that the trial court

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From Religion Found., Inc. v. State of Colorado, 872 P.2d 1256, 1265 (Colo. App. 1993). I agree with this observation.

[4] In *Allegheny County*, 492 U.S. 573, Justice Blackmun announced the judgment of the Court and authored the majority opinion of the Court with respect to parts III(A), IV, and V thereof. General references to *Allegheny County* in this dissent refer to the majority opinion.

failed to apply the correct legal standards, maj. op. at 31-32, but affirms the result reached by the trial court. *Id.*

I also conclude that the trial court failed to apply the applicable legal standards to the facts it found. I would therefore order the case remanded to the trial court for a new trial, to permit it and the parties to resolve the issues raised by the pleadings under the appropriate legal criteria. I also conclude that the plaintiff 's assertion that the state's conduct in effect endorses two religions to the exclusion of all others should be evaluated by strict scrutiny analysis. *Allegheny County*, 492 U.S. at 609; *Larson*, 456 U.S. at 246. Assuming, arguendo, that *Allegheny County* and *Lynch* control this case, and that the case need not be remanded for a new trial, I conclude that the state's conduct in this case in permanently displaying in a public park a religious symbol associated with two religions violates the Establishment Clause. I also find such conduct violative of the Preference Clause of Colorado's Constitution.[5]

B

The factual circumstances characterizing a particular governmental display of religious objects are of critical significance in Establishment Clause litigation. *Allegheny County*, 492 U.S. at 598. The trial court's findings are at best sparse. This fact, in my view, further supports the conclusion that further trial court proceedings should be required to permit the parties to litigate the case with awareness of the standards we hold applicable and to permit the trial court to make adequate findings in light of those standards.

In recognition of the inadequacy of the trial court's findings, the majority recites at great length some of the evidence in the record. Maj. op. at 3-9. The majority does not, however, delineate what it deems to be undisputed facts from what is a synopsis of portions of witness

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[5] My reasoning for this conclusion that the state's conduct violates Preference Clause prohibitions differs from that employed by the court of appeals.

testimony.[6] For example, the majority recites certain portions of the testimony of Gregory Robbins, a theology expert, as supportive of the majority's conclusion that "the Ten Commandments monument and its countervailing secular text fits within the melange of historical commemorative accounts found in Lincoln Park." Maj. op. at 31; *id.* at n.19. No witness testified that the text of the Ten Commandments was secular in nature, and the testimony of Dr. Robbins relating to the existence or non-existence of a "sacred zone" in Lincoln Park is of questionable relevance to the issue of whether the state's permanent display of the Ten Commandments monument may be perceived as an endorsement or a preference of some religion over other religions or of religion over non-religion.

The majority finds that the Ten Commandments monument does not "stand alone"; is located among a veritable cornucopia of other non-religious monuments, tributes and memorials, and in effect is one of many displays arranged al fresco in a "natural museum." Maj. op. at 28, 29. The majority also states, without denoting whether it is a factual, legal, or quasi-legal observation, that the Lincoln Park monuments "teaches a history of rich cultural diversity . . ." Maj. op. at 30. No witness testified that Lincoln Park was designed as, or perceived by, the state to be a museum. The Ten Commandments monument was placed in the park in the mid-1950's. At that time the only other commemorative objects in Lincoln Park were a flagpole,

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[6] The majority also on occasion resolves conflicting evidence on issues of fact not addressed by the trial court. For example, the majority states that one of the small decorative objects placed on the monument, an all-seeing eye, "has both secular and nonsecular meanings." Maj. op. at 25. In a footnote, the majority elaborates upon this statement, as follows: "The expert witnesses agreed that the 'all-seeing eye' is most commonly used as a secular symbol, giving its use on the one-dollar bill as an example." *Id.* at n.15. However, testimony in the record concerning the religious significance of this particular religious symbol -- that it in fact is used in vestments in Catholic ceremonies -- would support a finding that this object has primarily religious significance, especially to adherents of the Catholic religion. The majority in effect resolves the tension created by the conflicting testimony. The trial court did not resolve this question of witness credibility. The trial court's one reference to this factual issue consists of the following single sentence: "Above the eagle is something that's been described as the all-seeing eye, surrounded by a pyramid."

constructed in 1898, and a drinking fountain, constructed in 1923. The Liberty Bell was transplanted to Lincoln Park from another site in the 1970's, not to add to a museum but in response to a construction project. Nothing in the record suggests the decisions to build the Veterans Memorial in the 1990's and the decision to move the J.P. Martinez statue from north Denver to Lincoln Park in 1989 were motivated by thoughts of creating a "museum."

To the contrary, the primary authoritative evidence on this aspect of the case, a "State Capitol Grounds Landscape Master Plan" completed in January of 1987, states that "[t]he memorials, in general, do not appear to be incorporated into the design of the grounds and seem out of place." Lincoln Park is not comparable to a museum housing many religious paintings. It is significant that while the trial court did not find that the Ten Commandments monument was not isolated, the trial court did make the following comments:

> And as size goes, certainly this monolith is one of the smaller ones. It is there in plain sight on public land for anybody to see. I'll have to say for my own self, I didn't know for sure where it was when I went, as requested by plaintiffs' attorney, to go look at it, although I'm sure I've been by that intersection scores of times on foot.

In its opinion the court of appeals stated that " [t]he monolith in question here is physically isolated from all other monuments in much the same way that the creche in *Allegheny County* was isolated from the other displays and exhibits inside the same courthouse. Indeed, the displays on the east side of the [C]apitol cannot even be seen from Lincoln Park." *Freedom From Religion Found., Inc.*, 872 P.2d at 1264. This statement is supported by the trial court's comments concerning the size and number of monuments located in Lincoln Park and is consistent with the evidence. The difference between the court of appeals' view of the evidence and the majority's view of the evidence is significant because the surroundings of the monument are particularly critical to an evaluation of the effect prong of the *Allegheny County* test. The trial court should be required to make that determination.

The trial court found that the Ten Commandments monument is located "on state property denominated 'Lincoln Park'" -- an area more particularly described by the trial court as "the area between Lincoln, Broadway, Fourteenth Avenue, and Colfax Avenue." The trial court defined the Capitol grounds as a much larger tract of land "between East 14th Avenue and Colfax Avenue . . .[and] between Grant Street and Broadway." Lincoln Park thus consists of one entire city block; the "Capitol grounds" consist of the equivalent of three city blocks, including Lincoln Park.

The trial court described five additional monuments that it found to be located in the three-block area comprising all of the Capitol grounds: a Veterans Memorial, a Liberty Bell, a monument to the Challenger astronauts, a monument to Armenians,[7] and a monument consisting of a buffalo and an Indian. The trial court then made the following statements:

> If you look at the [C]apitol grounds as a whole, this is certainly a minor monument as the monuments on the [C]apitol grounds go. And the Court determines that the fact of its existence an a corner of the [C]apitol grounds does not foster, prefer, [or] establish any religion.

Thus the trial court neither found nor suggested that the Ten Commandments monument is located within close proximity to any other monument. This is not surprising. The uncontroverted evidence establishes that both the monument commemorating the Armenian genocide and the buffalo and Indian monument are located on the east side of the Capitol, across Lincoln Street, across the Sherman Street line which the Capitol straddles, and invisible to any person standing anywhere in Lincoln Park. The uncontroverted evidence also

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[7] According to the testimony of the Director of the Capitol complex facilities in the Denver Department of Administration, this monument "is called Armenian Guard" and was placed "by a group of Armenians in commemoration of the genocide and is maintained by them as far as flora plans on a yearly basis and so forth."

establishes that the Challenger memorial is located to the east of the Capitol, across Lincoln Street and approximately a full city block away from the Ten Commandments monument. Finally, it is undisputed that the Ten Commandments monument is located some distance away from the two monuments identified by the trial court as standing in Lincoln Park -- the Veterans Memorial and the Liberty Bell.[8] The court of appeals' statement that the Ten Commandments monument is physically isolated from all other monuments is properly based on the trial court's findings of fact and on the evidence in the record.

III

An accurate description of the Ten Commandments monument is as important to the resolution of the issues in this case as is an accurate description of the public park in which it is situated. The trial court described the monument in some detail, as follows:

> It starts out in the English language, "the Ten Commandments, I am the Lord Thy God." Then follow various Roman numerals with a total of Ten

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[8] The majority relates several additional facts regarding the Capitol grounds, which facts are not contained in the trial court"s findings. The majority states that portions of the Capitol grounds located across Lincoln Street, and thus approximately one block from the Ten Commandments monument, include a monument to soldiers who served and died in the Civil War; a bench dedicated as a Pearl Harbor monument; and "numerous arboreal tributes in honor of non-military activities and events ranging from Arbor Day to soil conservation efforts." Maj. op. at 4-5. The majority describes in detail the Challenger monument only generally identified by the trial court, referring to "an Aspen grove, comprised of seven trees, that was planted in memory of the Challenger Astronauts. . . ." *Id.* at 4. The majority also reports the following information concerning features of Lincoln Park: (1) a 20-foot tall statue in the park's northeast quadrant in tribute to J.P. Martinez, a World War II Hispanic medal of honor recipient; (2) a drinking fountain in the northwest quadrant dedicated to a person who aided war survivors in the early part of the century; and (3) a flagpole near the center of the park. *Id.* at 5-6. The majority further states that the Ten Commandments monument is located "approximately 50 feet west of the much larger 20-foot tall J.P. Martinez Hispanic veterans Memorial and about 30 feet east of the larger drinking fountain monument." *Id.* at 6. While all these statements of "fact" are based on evidence in the record, they are not facts found by the trial court.

> Commandments. On the bottom left corner and the bottom right corner are stars of David. In the middle of the bottom is a chi rho, which are Greek letters, which have been described, apparently by all witnesses to refer to CR; that is, Christ in Greek.[9] In English, at the bottom...is drawn-on scroll which provides...quote, Presented by Members of the Fraternal Order of Eagles of Colorado. On the sides of the monument are various floral designs which one witness described as being Byzantine...Above the words "the Ten Commandments" is an eagle and American flag. Above the eagle is something that's been described as the all-seeing eye, surrounded by a pyramid.[10] And there are two drawn tablets at the top left and top right which contain figures which may purport to be letters of some alphabet.

The trial court also described the monument as being "three or four feet high." Although the trial court did not describe the size of the various symbols, letters and sentences appearing on the monument, the evidence unequivocally establishes that the text of the Ten Commandments occupies almost the entire surface of the monument and is the dominant feature thereof. Both parties introduced evidence at trial to explain the religious, cultural, and historical significance of that text. Decisions concerning the selection of witnesses were necessarily driven by the parties' understanding from the court of appeals remand order that they were to consider *Conrad I* and *Lemon* as the sources of applicable legal criteria. Although several witnesses testified that some of the sentences comprising the text of the Ten

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[9] The majority describes the stars of David as "symbols of the Jewish religion," and describes the two letters as "a symbol for the first two letters in the name 'Jesus Christ' developed by the early Christian church and still found in many Catholic churches." Maj. op. at 7-8. I agree that these objects are religious symbols of the Christian and Jewish religions.

[10] The majority describes the all-seeing eye as an "Egyptian symbol [which] some people view...as representing the eye of God." Maj. op. at 7. The evidence is conflicting with respect to the religious significance of this object. *See supra* n.6.

Commandments may he considered statements of moral principles that underlie our system of law, the witnesses agreed that the complete text of the Ten Commandments as a whole is itself a religious symbol associated with the Jewish and Christian religions. The United States Supreme Court recognized this historical fact in *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam), when it observed that the "Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.

The trial court in this case found that "there are certain religious messages on this stone." This finding and the undisputed evidence of all the expert witnesses require the conclusion that the Ten Commandments monument displayed permanently in Lincoln Park is a religious symbol associated with the Jewish and Christian religions. The general fact that certain moral and ethical principles expressed by some of the sentences comprising the text are principles that underlie the political, social, cultural, and legal development of this nation, while a true observation, in no manner refutes or undermines the central religious significance of the text as a whole and the monument that so predominantly displays that text. It is, after all, denominated "The Ten Commandments" monument.[11]

The trial court found that the monument also depicts "the star of David, it's got a Christian symbol, it's got an Egyptian symbol, it's got patriotic symbols." The trial court apparently assumed that if a governmental display contains symbols that have both religious and secular meaning, the display must be deemed to have neither a religious purpose nor a religious effect for purposes of Establishment Clause analysis.[12]

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[11] The majority appears to concede that the monument is religious in character. Maj. op. at 13.

[12] The trial court's following statements illustrate this assumption:

> Looking at the monolith as a whole, it appears, as [one witness] said, to be a melange of civil, political, cultural, and religious meanings.

This assumption, in my view, distorts Establishment Clause analysis of governmental decisions to display religious objects. For purposes of Establishment Clause analysis, the ultimate question is whether a reasonable, objective observer would view the display as demonstrating a governmental purpose to endorse religion or in effect constituting governmental endorsement of religion. *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573, 592 (1989). The objective observer may be a member of some particular religion, an atheist, or an agnostic. *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985). While the entire contents of any particular display must, of course, be considered in the course of answering that question, a religious symbol does not cease being a religious symbol because it is placed among non-religious symbols. The fact that a particular display contains both religious and non-religious symbols begins rather than ends the inquiry.[13] In this case, the Ten Commandments monument predominately displays the full text of the Ten Commandments -- a religious symbol associated with two particular religions -- and is a religious symbol for purposes of Establishment Clause analysis.[14]

> And the Court finds that the overall effect of this is not to further or foster any religion -- even though there is certainly a mention of God stuff, the overall effect of this is not to foster, to prefer, or establish any religion.

[13] The Sixth Circuit Court of Appeals recently held that a framed portrait of Jesus, admittedly a reproduction of a well-known secular work of art, violated the Establishment Clause when displayed in a secondary school 's hallway which also contained a nearby trophy case, a painting of the school mascot and a bulletin board. *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679 (6th. Cir. 1994), *cert. denied*, 63 U.S.L.W. 3786 (U.S. May 1, 1995).

[14] Governments are not precluded from displaying religious symbols in appropriate settings. *Allegheny County*, 492 U.S. at 620-21. Governments are precluded, however, from displaying religious objects for the purpose of endorsing or preferring particular religions over other religions or religion over non-religion or from displaying religious symbols in such a manner that the effect of the display on objective religious, atheist, or agnostic observers constitutes such endorsement or preference.

IV

As indicated in Part IV(D) of this dissent, I believe that for purposes of the Establishment Clause strict scrutiny analysis must be applied to the state's conduct in permanently displaying on public property a monument allegedly endorsing two particular religions. However, the majority assumes, as did the court of appeals, that the legal standards adopted by the Supreme Court in *Allegheny County* should be applied to the Establishment Clause questions raised in this case.[15] Had it applied those standards, the trial court would have had to answer two basic questions: (1) whether the purpose of the State's conduct in permanently displaying a religious symbol in Lincoln Park was to endorse or foster one or more religions or religion in general over non-religion, and (2) whether the effect of such state conduct "is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by non-adherents as a disapproval, of their individual religious choices." *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573, 591 (1989)(quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985).[16]

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[15] The Court has articulated other tests for examining Establishment Clause issues. *See, e.g., Lee v. Weisman*, 112 S.Ct. 2649, 2661 (1992)(Establishment Clause prohibits school from compelling students to participate in a religious exercise); *Larson v. Valente*, 456 U.S. 228, 246 (1982)(strict scrutiny analysis applicable to evaluate state legislative program); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (three-part test for analyzing legislation: the statute must reflect a secular legislative purpose, its principal effect must neither advance nor inhibit religion, and it must not foster excessive governmental entanglement with religion); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 294-95 (1963) (Establishment Clause prohibits involvements of religions with secular institutions "which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular measures would suffice"). The Court has not disavowed any of these tests.

[16] The majority refers to other tests in the course of its opinion. The majority states that the issue for determination is whether the Ten Commandments monument itself violates the Establishment Clause or "communicates a prohibited endorsement or disapproval of religion." Maj. op. at 2, 13. The majority also states that it concludes that "the monument's content and its setting . . . sufficiently neutralize its religious character resulting in neither an endorsement nor a disapproval of religion." Maj. op.

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Assuming, arguendo, that the criteria articulated in Allegheny County are applicable here, in my view the court of appeals correctly concluded that the state's conduct violated the Establishment Clause.[17]

A

While the test articulated in *Allegheny County* seems relatively concise, a brief review of the evolution of that test is useful in considering how the test should be applied here. In *Lemon*, 403 U.S. 602, the United States Supreme Court established a tripartite test to measure governmental conduct in cases alleging violations of the Establishment Clause. To survive the intermediate standard of review required by *Lemon*, the statute or conduct must have a secular

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at 13 (footnote omitted). However, the Supreme Court has recognized that a museum setting does not neutralize the religious content of a religious painting, but may negate "any message of government endorsement of that content. "*Allegheny County*, 492 U.S. at 595 (quoting *Lynch*, 465 U.S. at 692 (0 ' Connor, J. , concurring).

The majority states that "if there are countervailing secular passages or symbols in the content of the display or if the context of the display detracts from its religious message, then the display may be constitutional." Maj. op at 24. The majority states that "the monument is not located so as to have a coercive effect," maj. op. at 29, and that one should not "exaggerate the effect of benign religious messages by suggesting they automatically inculcate religion." Maj. op. at 32. The Supreme Court has expressly emphasized that coercion is not a necessary element of any Establishment Clause claim. *Allegheny County*, 492 U.S. at 597-98 n.47, and cases there cited. The majority also states that "any religious meaning of legal consequence must ultimately flow from the character of the state action as perceived by an objective observer, but does not turn on whether the message, though secular, also has religious value." Maj. op. at 32. It is not clear whether some or all of these formulations indicate tests other than the purpose and effect test established in *Allegheny County*.

[17] The court of appeals and the majority apparently assume that based on *Conrad v. City and County of Denver*, 656 P.2d 662 (Colo. 1983)*(Conrad I)*, and *Conrad v. City and County of Denver*, 724 P.2d 1309 (1986)*(Conrad II)*, whatever tests the Supreme Court might adopt for Establishment Clause purposes automatically becomes the tests applicable to Preference Clause issues. In my view, *Conrad I* and *Conrad II* did not adopt so rigid a formula. Furthermore, this assumption does not begin to address the difficulties created by the Supreme Court 's acknowledgment that it has developed more than one test for resolution of Establishment Clause claims.

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legislative purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster an excessive governmental entanglement with religion. *Id.* at 612-13. Government conduct may not violate any one of these three prongs. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).[18]

Lemon provided the Court with an early opportunity to examine the delicate balance between appropriate and constitutionally prohibited governmental conduct having religious significance. *Lee*, 112 S.Ct. at 2663 (Blackmun, J., concurring). That jurisprudence emerged primarily from cases wherein plaintiffs challenged government conduct requiring student participation in sectarian prayers in school classrooms. The Court has never viewed the *Lemon* test as constituting the sole mode of analysis for claims alleging governmental violations of the Establishment Clause. To the contrary, the Court has emphasized its "unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); *see also Lee*, 112 S.Ct. 2649; *Marsh v. Chambers*, 463 U.S. 783 (1983); *Larson*, 456 U.S. 228. In *Larson*, the Court emphasized that the *Lemon* criteria "are intended to apply to laws affording a uniform benefit to all religions, and not to provisions . .. that discriminate among religions." *Larson*, 456 U.S. at 252 (emphasis in original) (footnote omitted).[19]

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[18] In *Lemon*, 403 U.S. at 619-21, the Court determined that although a state statute authorizing direct aid to religious and other private schools for teaching secular subjects had a secular purpose, because substantial state supervision was required to implement the aid, the statute fostered an impermissible degree of entanglement between government and religion. The Court did not apply the purpose prong of the test it articulated.

[19] The Court has on occasion refused to apply the *Lemon* formulation to Establishment Clause claims. In *Marsh*, 463 U.S. 783, the Court did not employ the *Lemon* test in determining that government conduct in conducting a prayer at the outset of each day of a legislative session did not violate Establishment Clause principles. In *School Dist. of Grand Rapids*, 473 U.S. 373, the Court employed an endorsement test in concluding that governmental conduct utilizing public school teachers to provide instruction to religious school students in classrooms leased from religious schools violated the Establishment Clause. In *Larson*, 456 U.S. 228, the Court found the *Lemon*

In *Lynch*, Justice O'Connor made the following statements concerning her view that the purpose and effect prongs of the *Lemon* test should be revised to more faithfully reflect Establishment Clause principles:

> The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community....[Government endorsement of religion] sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

Lynch, 465 U.S. at 687-88 (O'Connor, J., concurring) (emphasis added); accord *Allegheny County*, 492 U.S. at 593; *School Dist. of Grand Rapids*, 473 U.S. at 390. In *Allegheny County*, the Court adopted a test requiring determination of "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence." *Allegheny County*, 492 U.S. at 592. In so doing, the Court made the following observation:

> The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community. "

Id. at 594 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).

The endorsement test proposed by Justice O'Connor in *Lynch*

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test inappropriate for analysis of a state statute alleged to be discriminatory against some religious organizations and instead applied a strict scrutiny analysis. See *also Wallace v. Jaffree*, 472 U.S. 38 (1984); *Lee*, 112 S. Ct. 2649.

and adopted by the Court in *Allegheny County* has modified both the purpose and effect prongs of *Lemon*. With respect to the issue of governmental purpose, the inquiry becomes whether the purpose of the conduct is to endorse religion rather than whether such conduct has a secular purpose. This shift in emphasis suggests that courts should no longer attempt to determine whether decidedly religious symbols in some manner lose their religious significance when placed in close proximity to non-religious symbols.

The Court's modification of the effect prong of the *Lemon* test is also significant. Under *Lemon*, the effect portion of the inquiry focused on the extent to which challenged government conduct in fact advanced or inhibited religion. Under the *Allegheny County* test, attention is focused on the question of whether a reasonable, objective observer would perceive the government conduct as endorsing particular religions or religion in general. *Allegheny County*, 492 U.S. at 592. As applicable in *Allegheny County* and here, this standard requires consideration of the perspectives of reasonable observers who are neither Christian nor Jewish as well as the perspectives of those who adhere to either of these religions. *Id.* at 620 (Blackmun, J.,.opinion).

There is tension between the reasonable observer concept adopted in *Allegheny County* and Justice O'Connor's recognition that government conduct may neither be perceived as granting a favored, insider status to adherents of a particular religion nor be perceived as displaying disfavor or creating outsider status to non-adherents. *Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring). The tension is somewhat dissipated by the Court's recognition that the *Lemon* formulation is not the sole means of resolving Establishment Clause challenges. *Lynch*, 465 U.S. at 679. It is further dissipated by the Court's recognition that the *Lemon* criteria are not applicable to government conduct that allegedly discriminates among religions. *Larson*, 456 U.S. at 252. Finally, the "reasonable observer" standard appears to incorporate an "educated" reasonable observer concept -- a person "acquainted with the text, legislative history and

implementation of the statute." *Wallace*, 472 U.S. at 76 (O'Connor, J.,

concurring)[20]

B

The majority has elected to resolve the issues raised by the pleadings by applying the *Allegheny County* test to certain evidence contained in the record. It first finds that the "text includes symbols of at least two significant religions, Judaism and Christianity, whose teachings are in substantial conflict with each other." Maj. op. at 25 (footnote omitted). The Ten Commandments monument includes several texts, the most prominent of which is the text of the Ten Commandments as composed by representatives of Christian and Jewish religions. The majority finds that the "juxtaposition of the Christian Chi and Rho with the Jewish Star of David reflects acknowledgment of reconciliation and diversity more than any sentiment of intolerance." *Id.* While this interpretation of the symbolic significance of the monument as a whole finds some support in the record, some witnesses testified that the two objects are singularly and unmistakenly religious in character. As the majority concedes, a statement to the effect that the purpose of the monument is to portray concepts of reconciliation and diversity would help clarify the question of the state's purpose in displaying the monument. *Id.* at 27. No such statement exists.

The records contains no direct evidence of the state's purpose in permanently displaying the Ten Commandments monument in Lincoln Park. The majority determines that such purpose "is consistent with the stated secular purpose of the donation," citing lengthy portions of an affidavit of a retired Minnesota juvenile court judge who initiated a National Youth Guidance program in the 1940's that included the posting of copies of the Ten Commandments through the nation. *Id.* at

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[20] Justice O'Connor has suggested that the reasonable observer endorsement formulation is prompted in part by a desire to reconcile concededly competing interests embodied in the Free Exercise Clause and the Establishment Clause of the First Amendment to the United States Constitution. *Wallace*, 472 U.S. at 82-84 (O'Connor, J., concurring). No Free Exercise challenge has been asserted in this case.

26. I find no basis in the evidence to support the majority's determination that the purpose of the state in permanently displaying the monument in 1990 was consistent with the purpose attributed to the donors of the monument in the mid-1950's, and therefore cannot conclude that the state's purpose in 1990 was not to endorse the two religions identified with the Ten Commandments monument. However, as I previously indicated, I believe both parties should be given an opportunity to litigate the issues in this case with knowledge of the legal criteria that govern those issues.

The majority also concludes that the state's permanent display and maintenance of the Ten Commandments monument in Lincoln Park does not in effect constitute endorsement of the two religions associated with that religious symbol or of religion in general. The majority states that the monument is found in "what is much like a museum setting" and that "[t]he various monuments found around the park in fact represent a cornucopia of different cultural events and experiences that make up the history of our nation and reflect upon a history that is also Colorado." *Id.* at 29. The trial court made no such findings, and no witness suggested that either the one-block area known as Lincoln Park or the three-block expanse constituting the Capitol grounds constitutes a museum-like setting.

As applied to this case, the effect test articulated in *Allegheny County* requires judicial determination of whether a reasonable person, whether an adherent of any particular religion or an adherent of no religion, viewing the Ten Commandments monument as it is permanently displayed in Lincoln Park, would conclude from such viewing that the state is endorsing the two religions associated with that symbol or is endorsing religion in general. The court of appeals, applying this test to the trial court's findings and to undisputed evidence contained in the record, concluded that the state's conduct in effect constitutes state endorsement of religion, in contravention of the Establishment Clause. I agree with the court of appeals' conclusion.

Four courts have had occasion to examine the constitutionality of governmental displays of various versions of the Ten

Commandments. Three of those courts, including the Supreme Court, found the challenged government conduct to be prohibited by the Establishment Clause. In *Stone v. Graham*, 449 U.S. 39 (1980), the Court in a per curiam opinion held that a Kentucky statute requiring the posting of a version of the Ten Commandments in all public elementary and secondary school classrooms had no secular legislative purpose in spite of the fact that the statute required the display of the Ten Commandments to be accompanied by a notation to the effect that the Ten Commandments influenced the fundamental legal code of Western civilization and the common law of this nation. In *Ring v. Grand Forks Public School District*, 483 F. Supp. 272 (D.N.D. 1980), the court concluded that a North Dakota statute requiring the posting of a placard containing the Ten Commandments of the Christian religion in public elementary, secondary, and higher education classrooms violated the purpose prong of the *Lemon* test. In *Harvey v. Cobb County, Georgia*, 811 F. Supp. 669 (N.D. Ga. 1993), the court rejected the argument that a display of the Ten Commandments merely represented a "historical, jurisprudential cornerstone of American legal significance"; concluded that the Ten Commandments constitute a sacred text in the Jewish and Christian faiths; and determined that in the context of its location in the County courthouse the display had the effect of endorsing religion.

In *Anderson v. Salt Lake City Corporation*, 475 F.2d 29 (10th Cir. 1973), the Tenth Circuit Court of Appeals, applying the then recent *Lemon* test, reversed determinations by the trial court that a monument substantially similar to the Ten Commandments monument under consideration in this case was clearly religious in character and was adopted with the purpose and primary effect of advancing religion. The appellate court concluded that the monument was primarily secular in nature and that neither its purpose nor its effect tended to establish religious belief. The judgment and reasoning of *Anderson* is inapposite here because the test there applied is no longer applicable to claims asserting governmental violations of the Establishment Clause. I find the reasoning of the *Harvey* court -- the most recent judicial evaluation of a governmental display of the Ten Commandments on public property -- to be persuasive. As in *Harvey*, in this case the text as

displayed on the Ten Commandments monument constitutes an unmistakable religious symbol of two religions, Christianity and Judaism. The two Stars of David and the Chi and Rho are also religious symbols of these religions. No effort has been made by the state to inform persons viewing the Ten Commandments monument of any secular significance this monument might arguably have. Under these circumstances, I conclude that the court of appeals correctly held that the display of the Ten Commandments in Lincoln Park conveys the impression to any reasonable, objective observer that the State of Colorado endorses the Jewish and Christian religions or endorses religion in general. An agnostic, atheist or member of some religion other than Christianity or Judaism would reach the same conclusion upon viewing the Ten Commandments monument as it is displayed in Lincoln Park.[21] The Establishment Clause prohibits such governmental conduct.

D

The majority has concluded that the *Allegheny County* test is applicable to the Establishment Clause challenge here raised. However, in view of the trial court's findings that the Ten Commandments monument contains religious symbols of significance to two specific religions rather than to religion in general, the appropriate mode of Establishment Clause analysis in this case is the strict scrutiny standard adopted by the Supreme Court in *Larson*. *Allegheny County*, 492 U.S. at 609.

In *Larson*, the Court examined a statute that exempted certain religious organizations from registration and reporting requirements applicable to other charitable organizations. The Court found the *Lemon* test inapplicable and concluded that strict scrutiny analysis was

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[21] Anyone affiliated with a Christian sect or a Jewish denomination viewing this four-foot monument in its corner of Lincoln Park must conclude that the state has chosen to memorialize her or his religion. Such viewer must at the very least conclude that the state prefers persons affiliated with some religious entity over atheists, agnostics, and other persons who do not adhere to any particular religion.

appropriate because the statute granted preferences to several particulate religious denominations. *Larson*, 456 U.S. at 246. To survive strict scrutiny analysis, the state must establish a compelling governmental interest for its conduct and also establish that its conduct achieves that purpose by the most narrowly tailored means. *Id.* The state has failed to establish that its conduct in installing and maintaining a monument predominantly displaying symbols associated with two particular religions in a public park furthers a compelling governmental interest. The state 's conduct therefore violates the prohibitions of the Establishment Clause.

V

The state has chosen to install and permanently maintain on state property a monument displaying the text of the Ten Commandments and other symbols of Judaism and Christianity. This conduct creates a perception in reasonable, objective persons viewing the monument that the state prefers those two religions over other religions and that the state prefers persons who subscribe to some religion over persons who subscribe to no religion. In my view, such governmental conduct violates article II, section 4, of the Colorado Constitution.

Article II, section 4, of the Colorado Constitution contains the following provisions:

> **Religious freedom**. The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious

> sect or denomination against his consent. *Nor shall any preference be given by law to any religious denomination or mode of worship.*

Colo. Const. art. II, § 4 (emphasis added). The last sentence of the quoted text is commonly referred to as "the Preference Clause."

In *Conrad I*, we held that the *Lemon* test should be applied to determine whether a nativity scene erected and maintained in front of the Denver City and County Building during the Christmas holiday season violated the Preference Clause. *Conrad I*, 656 P.2d 662, 672 (Colo. 1983). However, we observed that the *Lemon* test was appropriate for judicial analysis of governmental actions "affording a uniform benefit to all religions, and that 'strict scrutiny' is appropriate in reviewing laws that discriminate among religions." *Conrad I*, 656 P.2d at 671 (citing *Larson v. Valente*, 456 U.S. 228 (1982)). Recognizing that both constitutional provisions "'embody the same values of free exercise and governmental non-involvement,'" we stated that we would look to the body of First Amendment law that has been developed in the federal courts "for useful guidance." *Conrad I*, 656 P.2d at 670-71 (quoting *Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072, 1081-82 (Colo. 1982)). We also emphasized that the specific language and purpose of the Preference Clause of the Colorado Constitution must be considered in this process. *Conrad I*, 656 P.2d at 671.

In *Conrad v. City and County of Denver*, 724 P.2d 1309 (Colo.1986) (*Conrad II*), we adhered to our determination in *Conrad I* that the *Lemon* test should be applied to the question of whether under all the relevant circumstances the city's conduct violated the Preference Clause. However, we again emphasized that particular factual circumstances could constitute a violation of the Preference Clause of Colorado's Constitution but not constitute a violation of the Establishment Clause. *Conrad II*, 724 P.2d at 1316. I wrote separately in *Conrad II* to express my view that our decision in that case was limited in scope and stated that, "[i]n view of the absolute language of article II, section 4, of the Colorado Constitution, a governmental

decision to expend public funds to display scenes of special religious significance to a particular religion might in other circumstances constitute discrimination among religions and, therefore, demand a strict scrutiny analysis." *Id.* at 1317 (Kirshbaum, J., specially concurring). I believe this case presents such other circumstances.[22]

In *Larson*, 456 U.S. 228, the United States Supreme Court held that a Minnesota statute granting exemptions from registration and reporting requirements of Minnesota's Charitable Solicitations Act, Minn. Stat. §§ 309.50-309.50 (1969 & Supp.1982), to religious organizations that received more than fifty percent of their total contributions from members or affiliated organizations violated the Establishment Clause. The statute, initially adopted in 1961, provided in general that charitable organizations other than religious organizations must comply with broad registration and disclosure requirements and was designed to protect persons contributing to such organizations and persons receiving donations from such organizations from fraud. *Larson*, 456 U.S. at 230-31. In 1978, the statute was amended to include the fifty percent rule at issue. The Court concluded that the statute had the effect of preferring some religious denominations over others and held that such denominational preference by the state violated the Establishment Clause, *Id.* at 230.

In reaching these conclusions, the Court emphasized that" [t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244. Noting that the fifty percent rule granted "denominational preferences of the sort consistently and firmly deprecated in our precedents," *id.*, at 246, the Court applied strict scrutiny analysis to the statute.

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[22] The majority apparently assumes sub silentio that the *Allegheny County* test now governs Preference Clause decisions. Should the Supreme Court at some future time modify, enhance, or reject *Allegheny County*, the then-new criteria, whatever their content, would presumably become the Preference Clause criteria. In my view, such a process is not conducive to sound construction of the unique language contained in Colorado's Preference Clause.

The Ten Commandments monument at issue in this case is permanently maintained by the state on state property. The monument prefers Christianity and Judaism over all other religions and also signifies government preference of religion over non-religion. The language and purpose of the Preference Clause compels application of strict scrutiny analysis to such governmental conduct.[23]

Under *Larson*, to survive strict scrutiny analysis the state must establish a compelling interest for its conduct and must establish that such conduct is narrowly tailored in furtherance of that compelling interest. *Id.* at 246-47. In this case, the state has introduced no evidence suggesting that its election to erect and maintain the Ten Commandments monument serves a compelling state interest. Its conduct therefore violates the Preference Clause.

Our Preference Clause was adopted in 1876. The states of Wisconsin and Idaho had previously adopted similar constitutional language -- language markedly different from the provisions of the Establishment Clause. Several other states have adopted constitutional provisions containing language comparable to the provisions of this state's Preference Clause.[24] Few decisions exploring the meaning of such provisions have been reported.

However, in *Fox v. City of Los Angeles*, 587 P.2d 663 (Cal. 1978), the California Supreme Court did examine the distinctive

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[23] In so concluding, I by no means discount the significance of the suggestion in *Conrad I* that the strict scrutiny test articulated by the Supreme Court in *Larson* might in some circumstances prove insufficiently protective of the values protected by the Preference Clause. *Conrad I*, 656 P.2d at 671-72.

[24] See Ala. Const. art. I, § 3; Ark. Const. art. II, § 25; Calif. Const. art. I, § 4; Conn. Const. art. I, § 4; Del. Const. art. I,§ 1; Fla. Const. Declaration of Rights, § 6; Idaho Const. art. I, § 4; Ind. Const. art. I, § 4; Kan. Bill of Rights, §7; La. Const. art. I, § 4; Me. Const. art. I, § 3; Mass. Const. Amendment XI; Minn. Const. art. I, § 16; Miss. Const. art III, § 18; Mont. Const. art. III, § 4; Neb. Const. art. I, § 4; N.M. Const. art. II, § 11; Ohio Const. art. I, § 7; Pa. Const. art. I, § 3; S.D. Const. art. VI, § 3; Tenn. Const. art. I, § 3; Tex. Const. art. I, § 6; Wis. Const. art. I, § 18.

language of California's constitution in holding that a display of a single-barred cross on the Los Angeles city hall during the Christmas holiday season and during both Latin and Eastern Orthodox Easter Sundays violated provisions of that constitution.[25] The court determined that the display constituted an impermissible governmental preference of one religion or several religions over other religions. *Id.* at 665. The court distinguished *Anderson v. Salt Lake City Corporation*, 475 F. 2d 29 (10th Cir. 1973), observing that under California's constitution the monument examined in *Anderson* would constitute a prohibited preference for one or several religions because such monument did not contain "Coptic, Universalist, or Scientology crosses, the Buddhist wheel, Shinto torii, Confucian yang-yin, Jain swastika, Zoroastrian vase of fire, or Unitarian flaming chalice." *Fox*, 587 P.2d at 665. The court concluded that the city's election to illuminate only the single-barred cross in effect constituted a preference for the Christian religion over other religions. *Id.* at 666.

Colorado's governmental institutions certainly need not eschew appropriate recognition of the significance of values, thoughts, principles, and practices of various religions to the legal, cultural, and political development of this state and this nation. However, the Preference Clause of Colorado's Constitution at the least prohibits governmental conduct that appears to a reasonable, objective observer to prefer one religion or several religions over other religions or to prefer religion in general over non-religion. In my view, strict scrutiny analysis is required to ensure the continuing viability of these principles.[26]

The Ten Commandments monument constitutes a permanent government display of symbols associated with the Jewish and Christian faiths. No other monument located in Lincoln Park or on other

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[25] California's constitution provides that the "[f]ree exercise and enjoyment of religion without discrimination or preference, are guaranteed." Calif. Const. art. I,§ 4.

[26] Such proscription is no more restrictive than current Establishment Clause principles. *Lee v. Weisman*, 112 S.Ct. 2649, 2667 (1992) (Souter, J., concurring).

portions of the Capitol grounds constitutes a religious symbol. The state has offered no evidence to support the conclusion that the permanent display of this religious symbol furthers a compelling state interest. In the absence of such evidence, the state's conduct violates the Preference Clause of Colorado's Constitution.

VI

In sum, I believe this case should be remanded to the trial court for a new trial, thus permitting it and the parties to address the issues in this case in light of whatever criteria we determine to be applicable to the significant Establishment Clause and Preference Clause questions raised by the pleadings. I believe a strict scrutiny standard must be applied to all of those issues. Assuming, arguendo, that the standards articulated by the United States Supreme Court in *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989), are applicable for purposes of Establishment Clause and Preference Clause analysis in this case, and that those standards should be applied by this court in the course of this appeal. I conclude, as did the court of appeals, that the state's election to permanently display the Ten Commandments monument in Lincoln Park constitutes endorsement of and preference for religion, in violation of the provisions of both the Establishment Clause and the Preference Clause. I therefore respectfully dissent from the majority opinion.

JUSTICE ERICKSON joins in my conclusion to remand for new trial.

SUPREME COURT, STATE OF COLORADO
CASE NO. 93SC554
CERTIORARI TO THE COLORADO COURT OF APPEALS, 92CA0107
DISTRICT COURT, CITY AND COUNTY OF DENVER, 89CV4275

ORDER OF COURT

THE STATE OF COLORADO; ROY ROMER, GOVERNOR OF THE STATE OF COLORADO; DEPARTMENT OF ADMINISTRATION, STATE OF COLORADO; AND FORREST CASON, EXECUTIVE DIRECTOR, DEPARTMENT OF ADMINISTRATION,

Petitioners,

v.

THE FREEDOM FROM RELIGION FOUNDATION, INC., A WISCONSIN NON-PROFIT CORPORATION; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.; JEFF BAYSINGER; HOWARD HUGULEY; GLENN V. SMITH; AND LEE WHITFIELD,

Respondents.

Upon consideration of the Petition for Writ of Certiorari filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, GRANTED as to the issues set forth below, and the briefs shall be filed as follows:

(a) Petitioners' Opening Brief shall be filed within forty days

from this date;

(b) Respondents' Answer Brief shall be filed within thirty days from receipt of the Opening Brief;

(c) Petitioners' Reply Brief may be filed within fourteen days from receipt of the Answer Brief.

Pursuant to C.A.R. 54 (a), the record on file will be treated as though sent up in response to a formal writ.

The summary of the issues as announced by the Court this day is as follows:

Whether the Court of Appeals opinion engaged in impermissible appellate fact finding, for instance in determining the context of the monument [in State park] contrary to the explicit finding of the trial court.

Whether the Court of Appeals opinion improperly relied on school setting cases.

Whether the Court of Appeals opinion contravenes precedent by concluding that it is axiomatic that the religious nature of the monument [in a State park] makes it unconstitutional.

Whether the Court of Appeals' opinion misapplied the holdings in *Stone v. Graham*, 449 U.S. 39 (1980); *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989) ; and *Lynch v. Donnelly*, 456 U.S. 668 (1984).

BY THE COURT, EN BANC, MAY 2, 1994.

SUPREME COURT, STATE OF COLORADO

Case No. 93SC554

PETITION FOR WRIT OF CERTIORARI
On Petition to the Colorado Court of Appeals
Court of Appeals No. 92CA0107

THE STATE OF COLORADO; ROY ROMER, GOVERNOR OF THE STATE OF COLORADO; DEPARTMENT OF ADMINISTRATION, STATE OF COLORADO; AND FORREST CASON, EXECUTIVE DIRECTOR, DEPARTMENT OF ADMINISTRATION,

Petitioners,

v.

THE FREEDOM FROM RELIGION FOUNDATION, INC., A WISCONSIN NON-PROFIT CORPORATION; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.; JEFF BAYSINGER; HOWARD HUGULEY; GLEN V. SMITH; AND LEE WHITFIELD,

Respondents.

Above named petitioners (hereafter "the State") petition this Court to grant certiorari review of the Colorado Court of Appeals' opinion in this matter (hereafter "the opinion") as discussed below.

ISSUES PRESENTED FOR REVIEW

1. Did the opinion engage in impermissible appellate fact finding, for instance in determining the context of the monument

contrary to the explicit finding of the trial court?

2. Did the opinion improperly rely on school setting cases?

3. Did the opinion contravene precedent by concluding that it is axiomatic that the religious nature of the monument makes it unconstitutional?

4. Did the opinion misapply the holdings in *Stone*, *Allegheny*, and *Lynch?*

....

Dated: October 22, 1993.

GALE A. NORTON
Attorney General

TIMOTHY M. TYMKOVICH
Solicitor General

MAURICE G. KNAIZER
Deputy Attorney General

THE COURT OF APPEALS
OF THE STATE OF COLORADO
Case Number 92CA0107

ORDER

FREEDOM FROM RELIGION FOUNDATION, INC. V STATE OF COLORADO

Upon consideration of the Petition for Rehearing filed by the Appellees herein, the Petition is hereby DENIED. It is ordered that issuance of the mandate is stayed to and including September 20, 1993, provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, they shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:
Criswell, J.
Briggs, J.
Hodges, J.

DATED: August 19, 1993

COLORADO COURT OF APPEALS June 17, 1993
No. 92CA0107

The Freedom From Religion Foundation, Inc., a Wisconsin non-profit corporation; The Colorado Chapter of The Freedom From Religion Foundation, Inc.; Jeff Baysinger; Harold Huguley; Glenn V. Smith; and lee Whitfield,

Plaintiffs-Appellants,

v.

The State of Colorado; Roy Romer, Governor of the State of Colorado; Department of Administration, State of Colorado; and Forrest Cason, Executive Director, Department of Administration,

Defendants-Appellees.

Appeal from the District Court of the City and County of Denver
Honorable Warren O. Martin, Judge
No. 89CV4275

Division III
Opinion by JUDGE CRISWELL
Briggs and Hodges, JJ., concur

JUDGMENT REVERSED
AND CRUSE REMANDED
WITH DIRECTIONS

Robert R. Tiernan, Denver, Colorado, for Plaintiffs-Appellants

Gale R. Norton, Attorney General, Raymond T. Slaughter, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Dianne E. Eret, First Assistant Attorney General, Denver, Colorado, for Defendants-Appellees

Coghill & Goodspeed, P.C., John P. Baker, Denver, Colorado, for Amicus Curiae American Civil Liberties Union of Colorado, Inc.

*Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, Sec. 5(3), and §24-51-1105, C.R.S. (1988 Repl. Vol. 10B).

Plaintiffs, two non-profit corporations and several individual citizens of Colorado, filed this action against the State of Colorado, the Governor, the State Department of Administration, and the department's executive director (collectively, the State), seeking the removal of a stone monument containing the Ten Commandments located in Lincoln Park near the state capitol in Denver and alleging that the stone's existence in its present location violates the "establishment clause" of the First Amendment and the comparable provision of the state constitution. In a previous appeal, this court, in *Freedom From Religion Foundation, Inc. v. State*, (Colo. App. No.89CA1937, February 7, 1991) (not selected for publication), reversed a summary judgment for the State and remanded the cause for further proceedings. Upon remand, the trial court conducted a trial and again entered a judgment for the State, from which judgment plaintiffs again appeal. Because we conclude that the monument, as it is presently located and displayed, offends against the controlling constitutional provisions, we reverse the trial court's judgment and remand the cause to it for the fashioning of an appropriate equitable decree.

The evidentiary facts that were presented to the trial court were largely undisputed.

The state capitol in Denver sits on an area comprising two city blocks. It is bounded by Colfax Avenue on the north, East Fourteenth Avenue on the south, Grant Street on the east, and Lincoln Street on the west. Both the east and west sides of this area are landscaped with lawn and trees.

There are several monuments on the east side of the capitol, including a large statue of a native American and a buffalo. None of these features, however, can be seen from west of the capitol. In front of the west entrance to the capitol is a monument to the civil war dead, which includes two cannons.

Directly west of the capitol, across Lincoln Street, is a one-block square park, owned by the state, known as "Lincoln Park." This park is considered to be a part of the capitol "complex." As it is

presently developed, the park is landscaped with lawn and trees.

Two diagonal pedestrian walkways traverse Lincoln Park, which meet roughly at its center, where there has recently been erected a Washington monument-type structure dedicated to the veterans of all of the nation's wars. The termini of these two walkways are at the park's four corners. Imbedded into the walkways, a short distance from each corner, is the seal of the state of Colorado (apparently denoting ownership of the park by the State) and the words, "Lincoln Park."

Several monuments, in addition to the one in the center, have been placed in Lincoln Park. In the park's southeast quadrant is a metal reproduction of the Liberty Bell. In raised letters on its side, the bell, like the original, has the phrase,"Proclaim liberty throughout the land and unto all the inhabitants thereof." Such phrase is taken from the Old Testament.

In the northwest quadrant is a large statue, some 20 feet tall, of a World War II solider. This monument is in tribute to a Hispanic medal of honor recipient and commemorates the participation in that war of Colorado citizens of Hispanic descent.

Abutting the sidewalk along Broadway, the street on Lincoln Park's west, is a small monument in the form of a metal fountain. It is dedicated to the memory of a specific individual, but the evidence at the trial did not further identify its purpose.

Also near the Broadway sidewalk, at mid-block, is a metal flagpole dedicated to persons killed in the Spanish American War.

Finally, in the northwest quadrant of Lincoln Park, adjacent to the diagonal walkway that runs in a generally northwest-southeast direction and 50 or more feet from the Hispanic veteran memorial, is the monument that is the subject of this litigation. It is located some 40 to 50 feet from the northwest corner of the park. That corner is adjacent to the intersection of Colfax Avenue and Broadway, one of the most well-known and busiest intersections in Denver. A much-used bus

stop is nearby on Colfax Avenue.

The monument in question is made of stone and is three to four feet high and about two and one-half feet wide. It is sculpted in the form of two tablets, at the top of each of which is a floral design that surrounds the representation of two other tablets. Inside these latter tablets are symbols which were identified at trial as Phoenician letters, but which form no intelligible words in that language. The opinion was expressed at trial that this portion of the monument was designed to suggest that the tablets' message finds its source in antiquity.

Between the two tablets on this monument is an eye within a triangle, an "all-seeing eye," similar to that depicted on the dollar bill. While this symbol is Egyptian in origin, its exact meaning is in some dispute; it may represent the eye of God. Immediately below this symbol is an American eagle which is grasping an American flag.

The text of the monument is immediately below the American flag. It reads as follows:

THE TEN COMMANDMENTS
I AM THE LORD THY GOD

I Thou shalt have no other gods before me.
II Thou shalt not take the name of the Lord thy God in Vain.
III Remember the Sabbath day to keep it holy.
IV Honor thy father and thy mother that thy days be long upon the land which the Lord thy God giveth thee.
V Thou shall not kill.
VI Thou shall not commit adultery.
VII Thou shalt not steal.
VIII Thou shall not bear false witness against thy neighbor.
IX Thou shall not covet thy neighbor's house.
X Thou shall not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his cattle, nor anything that is thy neighbor's.

Below this text, there are stars of David, symbols of the Jewish religion, located in each corner. In the center are two Greek letters, Chi and Rho, one superimposed over the other, which is a symbol for Jesus Christ developed by the early Christian church and still found in many Catholic churches.

At the very bottom of this monument there is the representation of a scroll with these words:

Presented
By Members of
FRATERNAL ORDER OF
EAGLES
OF COLORADO

This monument has been in place in this park since 1956. At that time, which was shortly after the issuance of C.B. DeMille's production of a movie entitled "The Ten Commandments," the Fraternal Order of Eagles (Eagles), which is a national fraternal and benevolent association, began distributing copies of the Ten Commandments.

The originator of the idea for the distribution of the Commandments was then a Minnesota trial judge, who had previously served as a juvenile judge. He conceived the idea of posting a copy of the Ten Commandments in each juvenile court in the country to demonstrate to the youths coming in contact with such courts that there were "recognized codes of behavior to guide and help them."

Initially, the Eagles rejected the notion of sponsoring the program because it was felt that such distribution "might seem coercive or sectarian." Eventually, however, representatives of the Jewish, Protestant, and Catholic faiths developed a version of the Ten Commandments (reflected on the monument in dispute) which was not identified with any one religious group, and on this basis, the Eagles agreed to support such a youth guidance program.

As this program was being implemented, however, it was determined, at the suggestion of C.B. DeMille, that stone monoliths would also be produced. Various of the Eagles' local organizations paid for these monuments and presented them to several local and state governments.

While it is agreed that the state accepted the monument as a gift and allowed it to be placed in its present location on state property, there is no evidence as to the procedure used to accept it. For example, the record does not contain a copy of any approving resolution of the General Assembly or of any committee of that body. There is testimony, however, that, in order to place any monument on these grounds, it is necessary to obtain the approval of a special committee of the General Assembly and to have a resolution of acceptance adopted by the General assembly. Yet, there are no written guidelines describing either the procedure to be used to obtain such permission or the substantive criteria to be used in granting or denying approval.

Since the monument has been erected, maintenance costs have been minimal. The state has, however, been required to use its employees to remove graffiti placed on the stone by vandals and to clean it on occasion.

Shortly before this action was commenced, plaintiffs wrote to the Governor, asserted that the monument's presence offended against the First Amendment and requested that it be removed. In his letter of reply refusing to remove it, the Governor acknowledged that the tablet "contained commandments [that] are directly opposed to the views" of plaintiffs, but asserted that "the tablet and the inscription are representative of the views of a large number of Colorado citizens."

During the course of the trial, both plaintiffs and the state presented expert witnesses. These witnesses all held advanced degrees in theology or related studies and most were ordained ministers. Their collective testimony explained some of the otherwise arcane symbolism on the monument. In addition, however, the testimony of these experts touched upon several other subjects.

First, while all agreed that the monument did not exactly reproduce the Ten Commandments as accepted by any particular sect, nevertheless, they also agreed that, by representing the Commandments with their references to a deity, the monument carried a religious message.

All of the experts also agreed that, at least to the extent that the Commandments established ethical or moral principles (such as their injunctions against murder, theft, and perjury), they were expressions of universal standards of behavior common to all civilized societies. Further, it was agreed that these moral standards, as influenced by the Judeo-Christian tradition, have played a large role in the development of the common law and have formed a part of the moral background for the adoption of the national constitution.

Finally, the opinions of these experts diverged with respect to the interpretation that an average, non-expert, observer might place upon the message contained on the monument in light of its location on state property.

Experts for plaintiffs opined that the existence of the various references to God contained on the monument directly below the presentation of the American flag, together with the monolith's location on clearly identifiable state property, convey the impression that the government is endorsing both the moral and the religious precepts contained on the stone.

In contrast, several experts for the State expressed the view that the monument could be seen as an allusion to the historical significance of the Ten Commandments, thereby conveying a secular meaning. One such expert opined that, because of the scroll and reference to the Eagles, the monument could be looked upon as constituting approval by the State of Colorado of the good works done by that organization. All of the State's experts declared that the monument in its present location could not be considered sacred and would not inspire worship.

The lay plaintiffs testified that the existence of the monument on

state property caused them to conclude that the state was approving both the religious and the moral precepts contained in the Ten Commandments. Because these religious precepts were inconsistent with the plaintiffs' strongly held views, they testified that the presence of the monument tended to demonstrate that their views were unacceptable to the state, and as a result, the monument's presence offended them. Other lay persons testified that they were not so offended.

In rejecting plaintiffs' claims, the trial court determined that the monument, while containing a religious message, was not erected with any intent to foster the religion of any particular sect. The court noted that it contains Egyptian, Jewish, and Christian symbols and that it also has patriotic symbols in the form of the eagle and the flag. Further, it concluded that the Commandments can have a secular meaning. Many of our laws have a foundation in the Bible, and the Commandments were one of the bases for the Constitution and the Bill of Rights.

It finally concluded, therefore, that, because the monument did not have the overall effect of fostering, preferring, or establishing any religion, its continued existence on state property would not violate the establishment clause of the First Amendment.

I.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion ...." And, this prohibition upon Congress has been made applicable to the states by virtue of the adoption of the Fourteenth Amendment. *Abbington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

As interpreted by the United States Supreme Court, this "establishment clause" does not just prohibit a government from preferring one religion or sect over another. Rather, it also prohibits a government from aiding or preferring *all* religions. *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), *See Lee v. Weisman*, ____U.S. ____, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992)

(Souter, J., specially concurring).

The traditional test for determining whether a state has undertaken action to aid or prefer religion in violation of the establishment clause was summarized more than 20 years ago in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). In that case, Chief Justice Burger authored a unanimous opinion in which it was determined, based on prior decisions of the court, that, if a government adopted legislation or otherwise became involved in an endeavor with religious connotations, such legislation or action would be considered to be consistent with the First Amendment only if:

1. the legislation or other action has a secular purpose;

2. "its *principal* or *primary* effect [is] one that neither advances nor inhibits religion"; and

3. it does not cause an "expressive entanglement" with religion. 403 U.S., 602, 612-613, 91 S.Ct. 2105, 2111, 27 L.Ed.2d 745, 755 (emphasis supplied).

The first two parts of the *Lemon* test have undergone some clarification and further delineation as a result of Justice O'Connor's special concurrence in *Lynch v. Donnelly*, 456 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), which was seemingly adopted as the proper approach to such issues by a majority of the Supreme Court in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989).

In *Lynch*, Justice O'Connor wrote that, whether a government's actions advance or inhibit religion under the *Lemon* test depends upon whether those actions reasonably can be interpreted as governmental endorsement or disapproval of religion. And, to determine this issue, two factors must be considered.

First, a court must consider what message the government intended to convey.

Second, irrespective of any governmental intent, a court must consider what message the government's actions actually convey to a reasonable person.

Both the government's intended message and the message actually given must be a secular one. Thus, if the government's actions would actually be interpreted by a reasonable person either to endorse or to disapprove of either a particular religion or religion in general, those actions will run afoul of the First Amendment's prohibition.

Finally, in considering the extent to which resolution of these questions depend upon the factual determinations of a trial court, Justice O'Connor's concurrence said this:

> But whether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.

Lynch v. Donnelly, 465 U.S. 668, 693-694; 104 S.Ct. 1355, 1370; 79 L.Ed.2d 604, 623.

We recognize that the continued viability of the *Lemon* test in this area has recently been questioned. *See*, *Lamb's Chapel v. Center Moriches Union Free School District*, ____ U.S.____, ____S.Ct.____, ____ L.Ed.2d____ (No. 91-2024, June 7, 1993) (Justice Scalia, concurring); *Lee v. Weisman*, *supra*. However, counsel for the State has conceded, and we agree, that, at least until there is a more definitive test expressly adopted by a majority of the Supreme Court, it is the *Lemon* test, as clarified by Justice O'Connor's opinion in *Lynch*, which contains the governing criteria for resolution under the First Amendment of the issues raised here.

Further, the state constitution, Colo. Const. art. II, § 4, contains provisions prohibiting "preference...to any religious denomination or mode of worship." This prohibition has been construed as being similar to the First Amendment's establishment clause. And, our supreme court has expressly adopted the *Lemon* test as the proper standard against which displays on government property should be judged under this state provision. *Conrad v. Denver*, 656 P.2d 662 (Colo. 1982) *(Conrad I)*. Hence, our determination whether the state's actions here violated the First Amendment will also resolve whether those actions violate this state constitutional provision.

II.

Since the adoption of the *Lemon* test by the Supreme Court, both that court and the lower federal courts have been called upon to consider the propriety of a government 's display of various religious symbols on public property in numerous contexts. These courts have considered whether either the temporary or permanent display of such items as the nativity scene (depicting the birth of Jesus Christ), the cross (the universal symbol of Christianity), the menorah (representing the Jewish faith), and the Ten Commandments, among others, violates the prohibition of the First Amendment.

In considering the circumstances involved in each particular display, the courts have recognized that nearly every such object, while possessing a religious significance, also can portray an event of historical significance or can convey an idea separate from or in addition to the religious symbolism. Therefore, close attention must be paid to whether the display has the purpose or effect of "endorsing" religion. *Allegheny County v. Greater Pittsburgh ACLU, supra*.

In considering the nature of the message that any particular display conveys, the two-step analysis described by Justice O'Connor in her concurrence in *Lynch* is used, *i.e.*, what message did the government subjectively intend to convey and what message would the reasonable observer attribute to the display. However, if the display would actually convey a religious message to reasonable observer, the

otherwise unexpressed and subjective intent of the government is of little consequence.

Three Supreme Court decisions are demonstrative of the approach that is required to be used here.

A Christmas nativity scene was at issue in *Lynch v. Donnelly, supra*. There, a city had annually erected a holiday display during the Christmas season. The display consisted of many figures and decorations associated with that holiday, including Santa Claus, his reindeer, candy-striped poles, a Christmas tree, carolers, a clown, an elephant, a teddy bear, and lights. Also included was a creche over which a banner read, "Season's Greetings." The majority of the court, which included Justice O'Connor by means of her special concurrence, held that the message communicated by the display, when considered as a whole, was simply a celebration of the holiday season and included a number of figures and symbols generally associated with that holiday. Under these circumstances, the inclusion of a nativity scene, while obviously bearing a religious connotation if considered alone, was also an accepted symbol of the holiday, and as such, its inclusion in the display did not violate the First Amendment.

Consistent with *Lynch*, our supreme court, in *Conrad v. Denver*, 724 P.2d 1309 (Colo. 1986)*(Conrad II)*, found no constitutional violation in the Christmas display on the grounds of Denver's city and county building, which, like the display in *Lynch*, included many figures and symbols associated with the holiday season.

The second Supreme Court opinion of significance also considered the propriety of a government's display of a nativity scene. In *Allegheny County v. Greater Pittsburgh ACLU, supra*, a county government had erected a creche upon a principal stairway in its courthouse. While there were other Christmas symbols (such as Christmas trees and boughs), as well as other displays (such as a gallery of art and other cultural exhibits), located in other parts of this courthouse, the Supreme Court emphasized that the creche was physically separate from any other display. It was surrounded by

evergreen decorations and a white picket fence, and above the manger scene was a banner saying, "Gloria in Excelsis Deo."

About a block from this county-owned courthouse was a building jointly owned by the county and the City of Pittsburgh. During the time that the creche was on display in the courthouse, there was located outside this other building a large Christmas tree next to which was a large menorah, which is a Jewish symbol associated with the Chanukah holiday occurring near the Christmas season.

The majority of the Supreme Court declared that the nativity scene in the courthouse constituted an "endorsement" of religion by the county and was, thus, violative of the establishment clause, but that the menorah next to the Christmas tree conveyed the secular message of the holiday season.

In distinguishing between these two displays, it was emphasized that there was no secular symbol that was in any way associated, either physically or ideologically, with the nativity scene; nothing was present to detract from the religious message that the creche sent. In contrast, because the menorah was displayed in association with a secular symbol of the holiday season, a Christmas tree, this display, like the display in the park in *Lynch*, sent a primarily secular message, rather than a religious message.

The opinion in *Allegheny County* has been interpreted to mean that, if an admittedly religious symbol is maintained on public property, such maintenance will be considered to be an endorsement of the religious theme of the symbol unless it is displayed in association with other, secular symbols or figures from which an overall secular message can be discerned by the reasonable observer. *See Ellis v. City of La Mesa*, 990 F.2d 1518, (9th Cir. 1993) (maintenance of cross on public property, unaccompanied by any secular display, violative of First amendment); *American Civil Liberties Union v. Wilkinson*, 895 F.2d 1098 (6th Cir. 1990) (permanent maintenance of rustic stable on state property, used as nativity scene during Christmas holidays but for other purposes throughout remainder of year, does not constitute

endorsement so long as large sign denying endorsement of "any religion or religious doctrine" is also displayed).

Finally, in *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980), the court considered the constitutionality of a Kentucky statute requiring that a copy of the Ten Commandments, to be purchased by private contributions, be posted on the wall of each public school classroom. The statute also required that, following the last Commandment, there should appear "in small print" the following disclaimer:

> The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.

Despite the disclaimer, the Supreme Court declared, on a summary basis, that the posting of the Ten Commandments was prohibited by the First Amendment. In doing so, the Supreme court first set forth what it considered to be the overriding significance of the Ten Commandments in these words:

> The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness....Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.

Next, it considered the purpose that displaying the Commandments was intended to have:

> If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

Finally, it determined that the "avowed" secular purpose for the posting, which was to be set forth in small print, could not avoid the conflict with the First Amendment.

Two of the justices dissented from the majority's substantive conclusions, arguing, as the trial court in *Stone* had found and as the trial court here concluded, that the Ten Commandments have had a significant impact on the secular legal codes of Western civilization. Hence, given this secular history, the dissenters would have held that the Commandments could appropriately be displayed because this secular purpose was emphasized by the statutory disclaimer.

The State here argues that the *Stone* decision must be read as applying only to a schoolroom in which impressionable youngsters constitute a "captive audience" for the message to be sent. However, even if we concede that the location of the posting in *Stone* may have added some element of coercion to the state's message, that element of the case does not detract from the Supreme Court's description of the religious nature of the Ten Commandments.

Further, other courts have not interpreted *Stone* in such a limiting fashion. In *Harvey v. Cobb County*, 811 F. Supp. 669 (N.D. Ga. 1993), for example, the court, applying the *Lemon* test and relying upon *Lynch*, *Allegheny County*, and *Stone*, declared that a framed panel of the Ten Commandments displayed on the wall of a county courthouse, unaccompanied by any countervailing secular passages or symbols, violated the establishment clause.

It is against this background of Supreme Court jurisprudence,

then, that we must apply the three-part *Lemon* test.

The first question to address is whether the State, in permitting the monument to be erected and in maintaining it on public property since that time, intended to fulfill a secular purpose. And, frankly, this record contains little, if any, evidence upon the point. The evidence is that no monument may be erected in this park without state approval. However, there is no evidence as to what criteria must be met to obtain such approval, nor any evidence of the basis for the approval of this specific monument.

Because there is no independent evidence of the state's intent, therefore, no conclusion with respect to the message that the state intended to convey can be drawn, except to the extent that the message that the display actually conveys to a reasonable observer might lead to some inference of that intent. However, because it is the content of the message actually conveyed that is determinative of the validity of the display here, in any event, we need not speculate upon the state's unexpressed intent.

In determining the message actually conveyed, we are bound to abide by the Supreme Court's conclusion in *Stone* that the Commandments are "undeniably a religious text." We must then determine whether anything else within the monument or anything otherwise associated with it modifies that religious message so that it becomes, primarily, a secular one. In considering this issue, we accept the unquestioned proposition that the Ten Commandments have been, as the trial court determined, a basis for at least some of the precepts of the common law and our legal system. Hence, the issue we address is not whether these commandments *could* convey a proper secular message; the issue is whether, given the circumstances under which they are displayed here, they do, *in fact*, convey such a message. We conclude that they do not.

First, while various symbols appear on the monument in addition to the text, nothing on the monument detracts from the essential statement that the Commandments come from God and are to be

obeyed for that reason. Indeed, if we assume that a reasonable observer would know the meaning of the symbols, all of them reinforce this religious message. The Star of David, the two Greek letters symbolic of Christ, and the all-seeing eye of God do not reveal to one viewing the monument that the Commandments are a part of our legal heritage; they say, rather, that they are a part of the Judeo-Christian religious heritage. Likewise, the representations of the two stone tablets with strange writing cannot reasonably be interpreted as representing something other than the original tablets that, according to Judeo-Christian doctrine, Moses received from God.

Nor is the addition of an eagle holding an American flag over the text sufficient to change the message from a religious to a secular one. We agree that the inclusion of these two symbols of the nation could arguably refer to the fact that the moral precepts of the Commandments is one of the foundations for the nation. However, the reasonable observer could just as easily conclude that these national symbols, which stand over the Commandments symbolically as protectors, were intended to convey the idea that the national government endorses the concepts, including the various religious mandates, in the text that follows.

We also conclude, contrary to the State's assertion, that no other monument in the capitol complex serves to interpret the Commandments outside this essential religious context. The monolith in question here is physically isolated from all the other monuments in much the same way that the creche in *Allegheny County* was isolated from the other displays and exhibits inside the same courthouse. Indeed, the displays on the east side of the capitol cannot even be seen from Lincoln Park.

Moreover, there is at present no single theme for the monuments in Lincoln Park -- one witness for the State described them as a "helter-skelter" display. To the extent that these other monuments have a dominant theme, it is to recognize and to memorialize all those persons who have served their country in time of war. How this theme is furthered by a memorial containing the Ten Commandments, or how

the Commandments' legal history is emphasized by these memorials to the nation's veterans, has not been explained by the State.

In short, we conclude that monument conveys an essential religious message that would appear to the reasonable observer to be endorsed and approved by the state because of its contents and its location on the property of the state, which is clearly identified as such. Its existence on such property under the circumstances described, therefore, violates the prohibition against the establishment of religion set forth in the First Amendment and the state constitution.

We recognize that, in reaching this conclusion, we differ from the trial court who heard the witnesses, both lay and expert, who testified in this case. However, except for the expression of opinions with respect to the impression given by the monument, the evidentiary facts are substantially undisputed. Further, the ultimate questions which the *Lemon* test requires the courts to answer are not questions of evidentiary fact; they are, rather, judicial questions to be resolved by the court as matters of law. *See Lynch v. Donnelly* (Justice O'Connor, specially concurring). *Cf. Conrad II supra* (Justice Lohr, specially concurring).

Generally, if a court determines that an existing display of a religious symbol offends against the First Amendment, an order requiring its immediate removal from public property would be appropriate. However, because it is the manner of its display, and not the symbol itself, that offends, some courts have granted the involved government an opportunity to change the display so that a secular, rather than a religious, message is sent. *See Harvey v. Cobb County, supra. See also Ellis v. City of La Mesa, supra.* This is a matter, therefore, that may be addressed by the trial court on remand.

The judgment of the trial court is reversed, and the cause is remanded to it for the adoption of an appropriate decree consistent with the views set forth in this opinion.

JUDGE BRIGGS and JUSTICE HODGES concur.

COURT OF APPEALS, STATE OF COLORADO

Case No. 92 CA 0107

NOTICE OF APPEAL
Appeal from the District Court, City and County of Denver, Colorado; The Honorable Warren O. Martin, Trial Court Judge; Case No. 89 CV 04275; Courtroom 18.

THE FREEDOM FROM RELIGION FOUNDATION, INC., a Wisconsin nonprofit Corporation, THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC., JEFF BAYSINGER; HAROLD HUGULEY; GLENN V. SMITH; and LEE WHITFIELD,

Plaintiffs-Appellants,

v.

THE STATE OF COLORADO; THE HONORABLE ROY ROMER, GOVERNOR OF THE STATE OF COLORADO; THE COLORADO DEPARTMENT OF ADMINISTRATION; and FORREST CASON, EXECUTIVE DIRECTOR OF THE DEPARTMENT OF ADMINISTRATION,

Defendants-Appellees.

COME NOW the Plaintiffs-Appellants, by and through their undersigned attorney, and hereby give notice of their Appeal from the dismissal of the Plaintiffs' case by the Denver District Court.

DESCRIPTION OF THE NATURE OF THE CASE

A. NATURE OF THE CASE: Plaintiffs are a nonprofit corporation,

its Colorado Chapter, and four individual Colorado taxpayers. Their Complaint, filed on March 16, 1988, asked that a monument containing the Ten Commandments be removed from the State Capitol grounds. The monument is permanently located in a public park near the intersection of Broadway and Colfax Avenue. The Complaint alleged that the presence of the monument on taxpayer property violates Article II, Section 4, of the Colorado Constitution and the establishment clause of the United States Constitution.

A trial to the Court was held December 9 through 11, 1991. Immediately at the conclusion of the trial, the Court rendered an opinion from the bench, entered judgment in favor of the Defendants, and ordered that the case be dismissed with prejudice. In its opinion, the Court stated that the monument has a secular purpose and that its principal effect is not to advance religion.

B. THE ORDER BEING APPEALED AND THE BASIS FOR THE APPELLATE COURT'S JURISDICTION: Plaintiffs-Appellants are appealing the Denver District Court's Order dated December 11, 1991 which entered judgment in favor of the Defendants and dismissed Plaintiffs' case with prejudice. A copy of the Order is attached hereto an Appendix A. The basis for this Court's jurisdiction is C.R.S. 13-4-102.

C. WHETHER THE ORDER RESOLVED ALL ISSUES BEFORE THE TRIAL COURT: The Order being appealed resolved all issues before the Trial Court.

D. WHETHER THE ORDER WAS MADE FINAL FOR PURPOSES OF APPEAL: The Order is final.

E. DATE OF ORDER: The date of the Trial Court's Order was December 11, 1991.

F. WHETHER THERE WERE ANY EXTENSIONS GRANTED FOR POST TRIAL MOTIONS: No such extensions were granted.

G. DATE OF FILING MOTION FOR POST-TRIAL RELIEF: No motion for post-trial relief was filed.

H. DATE OF DENIAL OF POST-TRIAL MOTION: No motion for post-trial relief was denied.

I. WHETHER THERE WERE ANY EXTENSIONS GRANTED TO FILE ANY NOTICE OF APPEAL: No such extensions were requested or granted.

ADVISORY LISTING OF THE ISSUES TO BE RAISED ON APPEAL

Among the issues to be raised on appeal are:

A. Whether a monument whose most prominent display is the Ten Commandments, and which contains other religious symbols, can be held to be primarily secular.

B. Whether the Trial Court erred in failing to apply the standard that a secular message, if any, (1) must be stated, not implied and (2) that it must be the predominant message.

C. Whether the Trial Court erred by failing to hold that the primary effect of the monument was to advance and endorse religion.

D. Whether the Trial Court erred by holding that a public display of the Ten Commandments is not a religious preference.

E. Whether the Trial Court erred by denying Plaintiffs' request for a jury trial.

F. Whether this appeal should be transferred to the Colorado Supreme Court on the grounds that its subject matter has a significant public interest and involves legal principles of major significance.

TRANSCRIPT INFORMATION

The transcript of proceedings before the Trial Court will be filed as part of the record on this appeal.

COUNSEL INFORMATION

Counsel for Plaintiffs-Appellants:

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Counsel for Defendants-Respondents:

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APPENDIX

Attached hereto, as Appendix A, is a copy of the District Court Order being appealed. Attached hereto, as Appendix B, is a photograph of the monument at issue which was filed with Plaintiffs' Complaint and was admitted in evidence at trial.

Dated January 21, 1992

Respectfully submitted,

_____

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(303) 691-0288

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 89CV4275 Courtroom 18

ORDER OF JUDGMENT

THE FREEDOM FROM RELIGION FOUNDATION, INC., a Wisconsin nonprofit Corporation; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.; JEFF BAYSINGER; GLENN V. SMITH; and LEE WHITFIELD,

Plaintiff(s),

vs.

THE STATE OF COLORADO; THE HONORABLE ROY ROMER, GOVERNOR OF THE STATE OF COLORADO; THE COLORADO DEPARTMENT OF ADMINISTRATION; and EXECUTIVE DIRECTOR OF THE DEPARTMENT DF ADMINISTRATION,

Defendant(s).

The Court, upon decision of the Court after trial to the Court hereby enters judgment pursuant to C.R.C.P. 58(a) as follows:

In favor of defendants, The State of Colorado, The Honorable Roy Romer, Governor of the State of Colorado, The Colorado Department of Administration, and Executive Director of The Department of Administration, and against plaintiffs, The Freedom From Religion Foundation, Inc., a Wisconsin nonprofit Corporation, The Colorado Chapter of the Freedom from Religion Foundation, Inc., Jeff Baysinger, Glenn V. Smith and Lee Whitfield.

The case is dismissed with prejudice.

The clerk shall enter this judgment on the register of actions pursuant ta C.R.C.P. 79(a).

Dated this 11th day of December, 1991.

BY THE COURT

Warren O. Martin
District Judge

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. 89CV4275, Courtroom 18

REPORTER'S TRANSCRIPT -- DECEMBER 11, 1991

THE FREEDOM FROM RELIGION FOUNDATION, INC., a Wisconsin nonprofit corporation; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.; JEFF BAYSINGER; GLENN V. SMITH; and LEE WHITFIELD,

Plaintiffs,

vs.

THE STATE OF COLORADO; THE HONORABLE ROY ROMER, GOVERNOR OF THE STATE OF COLORADO; THE COLORADO DEPARTMENT OF ADMINISTRATION; and EXECUTIVE DIRECTOR OF THE DEPARTMENT OF ADMINISTRATION,

Defendants.

The above entitled matter came on this date before the HONORABLE WARREN O. MARTIN, District Judge, presiding in Courtroom 18 of the District Court.

The following is a partial transcript of the trial held on said date, containing only the Court's ruling.

APPEARANCES:

For the Plaintiffs: ROBERT R. TIERNAN, ESQ.
For the Defendants: MICHAEL L. BIEDA, ESQ.

PROCEEDINGS

* *

(WHEREUPON, the following proceedings were had:)

THE COURT: Well, there is, on the state capitol grounds, a stone slab containing, among other things, a version of the Ten Commandments. In this action, the plaintiffs seek an order from this Court that this slab, which is called a monolith, among other things, be removed. And the defendants State of Colorado, the governor, the Department of Administration and the director of the Department of Administration resists that.

Plaintiffs are, first of all, The Freedom From Religion Foundation. It's a Wisconsin, nonprofit corporation. It's purposes are obviously stated in its title. It enjoys certain tax benefits by reason of its nonprofit status. The second plaintiff's the Colorado chapter. It's an affiliate of the national chapter -- the national foundation. And there are remaining three individual plaintiffs -- Jeff Baysinger, Glenn Smith and Lee Whitfield, who are citizens of Colorado and taxpayers.

The grounds on which the plaintiffs seek removal are the Colorado Constitution and the United States Constitution, and specifically those parts of those two Constitutions having to do with freedom of religion.

Article I of the amendments to the United States Constitution, which is Article I of the Bill of Rights, provides as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government or a redress of grievances."

Now, the part of Amendment I which the plaintiffs point to, which is the first part, which is the establishment clause, says,

"Congress shall make no law respecting an establishment of religion..."

The comparable state provision is Article II, Section 4 of the Colorado Constitution. It provides, quote, the free exercise and enjoyment of religious profession and worship, without discrimination shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall he required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

Again, the part of this article to which the -- on which the plaintiffs rely is the last sentence, which is, quote, Nor shall any preference be given by law to any religious denomination or mode of worship, unquote. This is what has been referred to as the preference clause of the Colorado Constitution.

One of the experts in this case, upon inquiry of the Court, described how he felt these provisions came to be found in our Constitutions. Historically, when Europeans started immigrating to this country, some of them -- a certain percentage -- came because of lack of religious freedom -- indeed, persecution based on their religious practices in Europe -- and they came to this country where they could exercise their religious beliefs. And ironically enough, after some of those same folks came here for their religious freedom, they imposed state churches and indeed imposed lack of religious freedom on other folks.

So when it came time to have the U.S. Constitution ratified by sufficient states, some far-thinking people thought it best that not only religious freedom be provided for but also for the fact that there be a provision that the state itself not establish any religion. And so in both the U.S. Constitution and in the Colorado Constitution there is a

provision that there will be religious freedom and the state will not sponsor religious practices.

And I think we're fortunate to have organizations like the plaintiffs in this case and individuals who are willing to be plaintiffs in this case because it's important, in order to maintain these freedoms and have the Constitution enforced, that there be willing folks to stand up and be counted and indeed bring lawsuits.

I was interested in something Deanna Frank said on Monday in this case -- that she worried that when she came to this court that she would be required to take some oath referring to God. And indeed, some judges still use an oath requiring somebody to swear by the ever-living God that some -- that what is going to be said is true. I've never used that oath because I think people are entitled to testify whether or not they believe in God.

And it is important, to the extent we can, to separate state actions from religious actions. And indeed, in this case, the Ten Commandments displayed on the state capital grounds certainly have some religious connotations. But obviously, from all the cases that have cited, that does not end the inquiry here.

It's recognized by the U.S. Supreme Court and the Colorado Supreme Court that the fact that there's some interrelationship does not cause this relationship to automatically become unconstitutional. Indeed, it's recognized that some relationship between a religion and the state is inevitable. And although tests have been laid down, what we end up with is that the law is that each case will have to be decided on what the particular facts are in this case and applying various tests set forth in various cases.

I think, first of all, we have to describe a little about the monolith itself. I guess nobody's called it marble. In looking at the photograph, which is Exhibit 1-- is this granite, does anybody know?

ONE OF THE PLAINTIFFS: It is granite.

THE COURT: Thank you.

It starts out in the English language, "the Ten Commandments, I am the Lord thy God." Then follow various Roman numerals with a total of Ten Commandments. On the bottom left corner and the bottom right corner are stars of David. In the middle of the bottom is a chi rho, which are Greek letters, which have been described, apparently, by all witnesses to refer to CR; that is, Christ in Greek. In English, at the bottom, are -- is a drawn-on scroll which provides, quote, Presented by Members of the Fraternal Order of Eagles of Colorado. On the sides of the monument are various floral designs which one witness described as being Byzantine. They may be just decoration. Above the words "the Ten Commandments" is an eagle and American flag. Above the eagle is something that's been described as the all-seeing eye, surrounded by a pyramid. And there are two drawn tablets at the top left and top right which contain figures which may purport to be letters of some alphabet. Nobody knows what they say. And they've been described as gobbledygook, and they're probably just decoration by the artist who drew this.

The evidence is that this monolith was presented to the state of Colorado about 1956 by the Fraternal Order of Eagles. The state apparently has no records whatever of how this came to be here. And the records we have came from some elderly members of the eagles themselves. The Fraternal Order of Eagles is a charitable organization, has no connection with any religion, apparently doesn't foster, support, or proselytize any religion. It was placed on the capitol grounds probably in 1956 and has remained there since.

The capitol grounds generally consist of a tract of land between East 14th Avenue and Colfax Avenue here in Denver, between Grant Street and Broadway. The capitol itself is located astride what would be Sherman Street. And going toward the west, toward where we are now in the City and County Building, is Lincoln Street, which traverses this mall area.

The monolith is located to the west of Lincoln Street and

something which, for the first time, I've learned is called Lincoln Park, which is surrounded by Lincoln, Broadway, 14th, and Colfax. The monolith is located in the northwest corner of Lincoln Park, sort of immediately behind the benches where people waiting for the bus wait -- sit. The monolith sits on what appears to be a concrete slab. Probably the total area of the slab is maybe four or five square feet. And the monument itself is three or four feet high.

The monument was paid for by the Eagles and apparently placed there by the Eagles at their cost. And it has remained there, at almost no cost to the state for maintenance, since that time. The man who has been the maintenance supervisor of capitol grounds for many years has said that on one occasion, somebody sprayed some paint on there and a few minutes, maybe a half hour or an hour, was used by state employees to remove the paint. Aside from that, the only maintenance done by the state was an occasional spraying job to wash off any urine deposited on it. So in essence, the monument was put there at no cost to the state and remains there at no cost or expenditure by the state

The capitol grounds itself contains a number of monuments. And monuments are one of those things being considered by the long-range planning committee for the capitol grounds. There's the Veterans Memorial, which, as I recollect, started out to be a Vietnam Veterans Memorial, sort of in the center of Lincoln Park there. There's the Liberty Bell, which itself apparently contains some part of a quote from Leviticus in the Bible, which is the same thing that's contained on the Liberty Bell in Philadelphia. There are monuments there to Challenger astronauts, to the Armenians who were massacred. There's a huge monument of a buffalo with an Indian and bow and arrow. In short, there are many monuments on the state capitol grounds.

And as size goes, certainly this monolith is one of the smaller ones. It is there in plain sight on public land for anybody to see. I'll have to say, for my own self, I didn't know for sure where it was when I went, as requested by plaintiffs' attorney, to go look at it, although I'm sure I've been by that intersection scores of times on foot.

As indicated earlier, this monument was presented to the state and paid for by the Fraternal Order of Eagles. We have an affidavit from a man named E. J. Ruegemer, R-U-E-G-E-M-E-R, who is apparently, at this date, an aged person living in Alexandria, Minnesota.

He says, in Paragraph 1, "I was born July 29,1902. I currently reside in Alexandria, Minnesota. With respect to the above-captioned matter, because of my age, I do not wish to travel to Denver, Colorado, or to participate in any formal legal proceedings, other than to prepare this affidavit for possible use in the above-captioned matter.

Paragraph 2, "I'm retired from the Stearns County Juvenile Court bench, where I served as a judge on the Court bench from 1941 to 1947, and the State of Minnesota District Court bench from 1947 to 1967. In my private life, as one way to participate in civil affairs, I was chief justice and chairman of the Youth Guidance Committee of the Fraternal Order of Eagles.

Paragraph 3, "In my work as a juvenile court judge, I came in frequent contact with youngsters who were in trouble with the law. It seemed to me that many of them were without any code of conduct or standards by which to govern their actions. About the year 1943, it occurred to me that they should -- could benefit from exposure to one of mankind's earliest codes of conduct -- the Ten Commandments. This was not to be a religious instruction of any kind, but to show these youngsters that there were such recognized codes of behavior to guide and help them. I developed the idea of posting a copy of the Ten Commandments in each juvenile courtroom in the State of Minnesota and later in juvenile courtrooms throughout the country."

Paragraph 4, "Such a program would require funding. I presented this idea to the Fraternal Order of Eagles, seeking their support. Initially, the idea was rejected by the Eagles because it was felt this might seem coercive or sectarian. Eventually, however, representatives from the Jewish, Protestant and Roman Catholic communities joined together and developed a version of the Ten Commandments which was not identified with any one religious group,

And on this basis, the Eagles agreed to support such a youth guidance program."

Paragraph 5, "While this program was being developed, I received a telephone call from motion picture producer Cecil B. DeMille, who was making a film called 'The Ten Commandments.' He told me that he thought the program was a wonderful idea and suggested that rather than paper copies, the Ten Commandments be put on bronze plaques for distribution throughout the country. I said that since the original Ten Commandments were on granite that this would be an even more suitable material. He agreed, and I worked with two local Minnesota granite companies to produce granite monuments inscribed with the Ten Commandments. Local aeries of Eagles throughout the country paid for monuments which they presented to their communities."

Paragraph 6, "Ceremonies were held in connection with the presentation of most of the monuments and some were attended by the film actors who appeared in the Cecil B. DeMille movie, by city, county and state officials, the Boy Scouts of America, and other civic organizations. Charleton Heston, who played Moses in the film, appeared at one ceremony, and Martha Scott, who played the mother of Moses, appeared at another. "

This is signed by Judge Ruegemer.

This being undisputed, the Court accepts his statement that they had no intent to further religion when they submitted these monoliths to the various people who accepted them. And there is no evidence one way or the other, frankly, what the state of Colorado had in mind when it accepted it.

We've had a lot of expert testimony on what the major import of this monolith is. We've had testimony from two former ministers from the plaintiffs -- one a former Presbyterian minister, one a former Evangelical minister -- and we've had testimony from at least three experts in religion from the defense side of the case.

There can be no doubt, and everybody agrees, that there are certain religious messages on this stone. Certainly, the first three commandments are religious in nature. But also can be said for fairly certain that there was no intent on the part of anyone, nor should anyone reading this determine that there was any intent, to foster religion of any particular sect. It's got the star of David, it's got a Christian symbol, it's got an Egyptian symbol, it's got patriotic symbols.

And the Ten Commandments themself, apparently, are worded in such a way as to satisfy various religious denominations and sects. The testimony was that it comes nearest to being the Ten Commandments used by the Roman Catholic church prior to Vatican II. It's clear, also, to the Court that this can have secular meaning. Many of the commandments are the basis for most laws in most of our civilization, certainly the western civilizations. And many of our laws have certain foundation in the Bible and in these commandments. And certainly, to that extent, there is a secular message - secular meaning to many of these commandments here. There is evidence to support, the Court finds, that the commandments are certainly a basis for our Bill of Rights and our Constitution. Perhaps not the only basis, but a basis.

Looking at the monolith as a whole, it appears, as Dr. Horn said, to be a melange of civil, political, cultural and religious meanings. And the Court finds that the overall effect of this is not to further or foster any religion -- even though there is certainly a mention of God stuff, the overall effect of this is not to foster, to prefer, or establish any religion. And that's just looking at the monolith in itself. If you look at the capitol grounds as a whole, this is certainly a minor monument as the monuments on the capitol grounds go. And the Court determines that the fact of its existence on a corner of the capitol grounds does not foster, prefer, nor establish any religion.

Making the findings of fact which are basically undisputed in the case are the easiest part. The problem is, fitting these findings of fact into the tests set forth by the appellate court is the difficult one. The

fact of the matter is that the facts don't always fit into these tests very well. But nevertheless, the courts -- appellate courts provide, and probably necessarily so, certain boxes to put these facts into and then, from placing those facts in the boxes, to reach a proper result.

So I conceive of my duty to look at the three factors set forth by the Colorado Supreme Court in *Conrad versus Denver*, which in turn took those three tests from the United States Supreme Court in the *Lemon* case.

In *Lemon*, the court ruled that the establishment clause analysis requires the consideration of three factors. First, the statute must have a secular legislative purpose. Second, its principal or primary effect must be one that neither advances nor inhibits religion. Finally, the statute must not foster an excessive government entanglement with religion.

So the question, first, then, is, does the monolith have any secular purpose. And the Court has indicated in its findings of fact, and I don't intend to repeat them, that the secular purpose is clear from the judge's affidavit and it's clear that it does exist from a view overall of the monolith and a view overall of its setting in the capitol grounds.

So the Court finds by a preponderance of the evidence, and the evidence is, that there is a secular purpose shown by the monolith as presented in its surroundings.

Number two, then -- second, its principal or primary effect must be one that neither advances nor inhibits religion. The Court determines by a preponderance of the evidence that its principal or primary effect is not one that advances or inhibits religion.

I had to agree with one of the witnesses for the defense in this case when they said that this clearly was not sacred ground. So nobody would consider this a place to carry on religious activity. It's not like the inside of a church. It's sitting out there in a public park, in a public place, and I would be very surprised if anybody carried on any religious

activity at any time of any kind in the area of this monolith because of its existence at that location. So I find that it does not advance religion.

And finally, the statute must not foster an excessive government entanglement with religion. I find that there is almost no entanglement at all in this case. Certainly, the state spends no money on it. The state doesn't require anybody to look at it. It doesn't -- as far as I know. I certainly accept the testimony of the individual defendants (sic) that they find it offensive, but it certainly doesn't lead to any political strife of any kind.

So I find that the First Amendment of the United States Constitution and the comparable provision of the state Constitution are not violated by existence of this granite slab on the state capitol grounds.

So the case is dismissed with prejudice. Okay?

We'll be in recess.

(WHEREUPON, at 10:40 a.m., this trial was concluded.)

STATE OF COLORADO
No. 89CA1937

THE FREEDOM FROM RELIGION FOUNDATION, INC., a Wisconsin nonprofit corporation; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.; JEFF BAYSINGER; HAROLD HUGULEY; GLENN V. SMITH; and LEE WHITFIELD,

Plaintiffs-Appellants,

v.

THE STATE OF COLORADO; THE HONORABLE ROY ROMER, GOVERNOR OF THE STATE OF COLORADO; THE COLORADO DEPARTMENT OF ADMINISTRATION; and FORREST CASON, EXECUTIVE DIRECTOR OF THE DEPARTMENT OF ADMINISTRATION,

Defendants-Appellants.

NOT SELECTED FOR PUBLICATION

Appeal from the District Court of the
City and County of Denver
No. 89CV04275

Honorable Robert P. Fullerton

DIVISION V
Opinion by JUDGE HUME
Plank and Ney, JJ., concur

JUDGMENT REVERSED
AND CAUSE REMANDED
WITH DIRECTIONS

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Denver, Colorado
Attorney for Plaintiffs-Appellants

Duane Woodard, Attorney General
Charles B. Howe, Chief Deputy Attorney General
Richard H. Forman, Solicitor General
Dianne E. Eret, First Assistant Attorney General
Denver, Colorado

Attorneys for Defendants-Appellants

Plaintiffs, The Freedom From Religion Foundation, Inc., the incorporated Colorado Chapter of that foundation, Jeff Baysinger, Harold Huguley, Glenn V. Smith, and Lee Whitfield, appeal a summary judgment dismissing their complaint against defendants, the State of Colorado, Colorado Governor Roy Romer, the Colorado Department of Administration, and the Executive Director of that department, Forrest Cason. We reverse and remand.

Plaintiffs' complaint alleges that defendants caused or permitted the erection of a stone monument bearing an engraved inscription of the Ten Commandments and other religious symbols on public property belonging to the State of Colorado. The complaint seeks removal of the monument, asserting that its presence and location are violative of their rights guaranteed by the Establishment Clause of the First Amendment and the preference Clause of Colo. Const. art. II, § 4.

Defendants answered by generally denying the material allegations made in the complaint, affirmatively asserting plaintiffs' lack of standing, and moving for a summary judgment of dismissal. Neither the defendants' answer nor the motion for summary judgment contains an attestation verifying its contents.

The motion for summary judgment includes an unverified "outline" of facts describing how, when, and by whom the monument had been erected and maintained and concerning the nature and duration of its placement in relation to other historic and non-sectarian memorials within a two square block area near the State Capitol Building. No affidavit or other exhibit was appended to support defendants' asserted factual "outline."

C.R.C.P. 56 (c) provides that summary judgment is proper if the pleadings and other enumerated verified materials show that there is no genuine issue as to any material fact. In ruling on a motion for summary judgment, the trial court must accept the allegations of a non-moving parties' pleadings as true unless the contrary is clearly shown by verified material setting forth facts as would be admissible in evidence. *See* C.R.C.P. 56(e); *Norton v. Leadville Corp.*, 43 Colo.

App. 527, 610 P.2d 1348 (1979). And, unless the moving party establishes the lack of disputed issues of material fact, summary judgment cannot be entered. *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo.1988).

A fact is material if its resolution will affect the outcome of the case. *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984).

Plaintiffs contend that resolution of the issues about the lawfulness of the monument's placement on public property requires consideration of the nature of the use to which the particular property is devoted, the nature and purpose of the particular monument, its placement, its proximity to and juxtaposition with other memorials in the same public area, and the nature of the forum and its effect upon the audience to which is its directed. We agree.

In *Conrad v. City & County of Denver*, 656 P.2d 662 (Colo. 1982), our supreme court adopted the three-part test enunciated by the United states Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) to determine whether governmental action violates the Establishment and Preference clauses of the federal and state constitutions. That test provides that challenged governmental action must (l) have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) the action must not foster "an excessive governmental entanglement" with religion.

A governmental display of artifacts or monuments derived from religious material such as the Ten Commandments may have a legitimate and primarily secular purpose. *See Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (1973). On the other hand, in a different factual and environmental context, a display of such a "sacred text" may have the primary purpose and effect of fostering a primarily religious purpose. *See Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980). The determination ultimately depends upon a careful consideration of the factual context from which the issue arose.

Here, the trial court was presented with facts asserted in plaintiffs' complaint which must be taken to be true absent a clear showing to the contrary. *See Mt. Emmons Mining Co. v. Town of Crested Butte, supra.* The unverified "outline" of facts set out as argument of counsel in defendants' legal memorandum was insufficient, under C.R.C.P. 56 (c) and C.R.C.P. 56 (e), to dispose of the factual issues so as to permit determination of plaintiffs' claims as a matter of law.

Accordingly, the summary judgment of dismissal is reversed, and the cause is remanded with directions that plaintiffs' complaint be reinstated and determined under the principles discussed herein.

JUDGE PLANK and JUDGE NEY concur.

SUPREME COURT, STATE OF COLORADO
COLORADO COURT OF APPEALS, #89CA0720
APPEAL FROM DISTRICT COURT, DENVER COUNTY, #89CV04275

ORDER OF COURT

THE FREEDOM FROM RELIGION FOUNDATION, INC., a Wisconsin nonprofit corporation, et al.,

Plaintiffs-Appellants,

vs.

THE STATE OF COLORADO, et al.,

Defendants-Appellees.

Upon consideration of the Request for Determination of Jurisdiction from the Colorado Court of Appeals, and now being sufficiently advised in the premises,

IT IS ORDERED that the Supreme Court Declines jurisdiction.

BY THE COURT, SEPTEMBER 26, 1990.

COLORADO COURT OF APPEALS
No. 89CA1937

THE FREEDOM FROM RELIGION FOUNDATION, INC., a Wisconsin nonprofit corporation, *et al.*,
Plaintiffs-Appellants,

v.

THE STATE OF COLORADO, *et al.*,
Defendants-Appellees.

Appeal from the District Court of the City and County of Denver
Honorable Robert P. Fullerton
REQUEST FOR DETERMINATION OF JURISDICTION
(Trial Court No. 89CV04275)

It appears that the issues raised by the briefs, copies of which are attached, are not within the jurisdiction of the Court of Appeals because they raise constitutional issues.

THEREFORE the case is referred to the Supreme Court with the request that it decide the question of jurisdiction pursuant to § 13-4-110 (1)(a), C.R.S.

BY THE COURT
Alan L. Sternberg
Chief Judge

Dated: September 24, 1990
Enclosures: 3 Briefs
Copies to: Counsel of Record

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 89 CV 4275, Courtroom 14

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND DISMISSING PLAINTIFF'S CLAIMS

THE FREEDOM FROM RELIGION FOUNDATION, INC., a Wisconsin nonprofit corporation, *et al.*,

Plaintiffs,

v.

THE STATE OF COLORADO, *et al.*,

Defendants.

THIS MATTER comes before the Court upon the Motion for Summary Judgment by the Defendant State of Colorado by its attorney, pursuant to C.R.C.P. Rule 56.

The Court, having read the Motion and Brief, Plaintiff's Responsive Brief, Defendant's Reply, and all matters pertinent and relevant, finds and concludes:

1. This matter arises from a Complaint by Plaintiffs, taxpayers and members of Freedom From Religion, Inc. Plaintiffs allege a monolith is on public property, and is inscribed allegedly with the Ten Commandments. Plaintiffs assert the monolith supports a particular religion or religions, and they assert it serves no legitimate secular purpose. The monolith was allegedly placed in position in 1956, was provided by the Fraternal Order of Eagles, and is in an area with

several other memorials.

2. The Colorado Supreme Court noted in *Conrad v. City & County of Denver*, 724 P.2d 1309 (Colo. 1986), that it had "derived guidance in interpreting the Preference Clause by looking at the Establishment Clause of the United States Constitutional and the body of federal law that has construed it....The *Lemon* test is well-suited to a determination of the central issues...." In a similar case, the 10th Circuit determined that a similar monument, by the *Lemon* test, did not violate constitutional provisions. The Court finds the reasoning in the cases persuasive, and that a "precedent legal code" is involved, from an era of religious history, and that its purpose does not tend to establish religious belief. The Court finds neither a violation of the United States Constitution nor the Colorado Constitution.

3. Summary judgment is proper when a party is entitled to prevail as a matter of law. *Happy Canyon Inv. Co. v. Title Ins. Co.*, 38 Colo. App. 385, 560 P.2d 839 (1976).

THEREFORE, IT IS ORDERED that Defendant's Motion for Summary Judgment is granted, and Plaintiffs' claims are dismissed.

Done this 13 day of October, 1989.

BY THE COURT:

Robert P. Fullerton
District Court Judge

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 89 CV 04275

COMPLAINT

THE FREEDOM FROM RELIGION FOUNDATION, INC., a Wisconsin nonprofit Corporation; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC; JEFF BAYSINGER; HAROLD HUGULEY; GLENN V. SMITH; and LEE WHITFIELD,

Plaintiffs,

v.

THE STATE OF COLORADO; THE HONORABLE ROY ROMER, GOVERNOR OF THE STATE OF COLORADO; THE COLORADO DEPARTMENT OF ADMINISTRATION; and FORREST M. CASON, EXECUTIVE DIRECTOR OF THE DEPARTMENT OF ADMINISTRATION,

Defendants.

COME NOW Plaintiffs, by and through their undersigned counsel, and for a Complaint, plead and allege as follows:

1. Individual Plaintiffs are Colorado taxpayers, residents of the State of Colorado, and members of the Freedom From Religion Foundation, Inc. and its Colorado chapter.

2. The Freedom From Religion Foundation, Inc. is a non-profit

corporation existing under the laws of the State of Wisconsin and qualified to do business in the State of Colorado, One of the Foundation's primary objectives is to promote the constitutional principle of separation of state and church. The Foundation's Colorado Chapter is an association constituted of Foundation members who promote this objective in the State of Colorado.

3. Defendant Roy Romer is the Governor of the State of Colorado and its chief executive officer.

4. Defendant Colorado Department of Administration is a department of the State's executive branch which has jurisdiction and control over the State Capitol grounds and all fixtures, furnishings, equipment, and exhibits placed on such grounds.

5. Defendant Forrest M. Cason is Executive Director and head of the Colorado Department of Administration.

6. Erected on State property near the intersection of Broadway and Colfax Avenue in the City and County of Denver, Colorado, is a stone monolith inscribed with the Ten Commandments. The inscription begins as follows:

"**I AM** the **LORD** thy God

I. Thou shalt have no other gods before me."

7. Also inscribed on the monolith are the All Seeing Eye of God, the Star of David, letters of the Hebrew alphabet, and Christ or Peace. The center of the monolith is inscribed with an American flag and an eagle, this country's national symbol.

8. A photograph of the monolith is attached to the Complaint as Exhibit A and incorporated herein by reference.

9. The presence of this monument on public property violates Article II, Section 4, of the Colorado Constitution in that it supports a

particular religion or religions and constitutes a religious preference. It also violates the Establishment Clause of the United States Constitution in that it does not have a legitimate secular purpose, its principal or primary effect is to advance religion, and it fosters an excessive governmental entanglement with religion.

10. Plaintiffs have standing because they are injured and because their right to a government that does not support religion or prefer some religions over others is violated. At least one Plaintiff has altered his behavior as a result of becoming aware of the monolith's presence.

11. The individual Plaintiff's rights as taxpayers are violated in that the display results in the expenditure of taxpayer funds and the dedication of taxpayer assets for unconstitutional purposes.

12. The Freedom From Religion Foundation and its Colorado Chapter have standing because (a) their members otherwise have standing to sue in their own right, (b) the interests sought to be protected are germane to the Foundation and to the Chapter, and (c) neither the claim asserted nor the relief requested requires the participation of individual members.

13. Plaintiffs have requested that the monolith be removed from public property. Attached hereto and incorporated herein by reference as Exhibit B is a copy of Governor Roy Romer's letter denying this request.

WHEREFORE, Plaintiffs pray that this Honorable Court enter an Order:

A. Requiring Defendants to remove the monolith from public property;

B. Granting Plaintiffs' costs herein, including reasonable attorney's fees; and

C. Granting Plaintiffs such other and further relief as the Court may deem just and proper.

Respectfully submitted,

Robert R. Tiernan #16301
Attorney for Plaintiffs
950 S. Cherry Street #415
Denver, CO 80222
(303) 691-0288

Dated: March 16, 1989

STATE OF COLORADO

Executive Chambers
136 State Capitol
Denver, CO 80203-1792
Phone (303) 866-2471

Roy Romer
Governor

March 2, 1989

Robert R. Tiernan
Attorney at Law
950 South Cherry Street, Suite 415
Denver, CO 80222

Dear Mr. Tiernan:

Your letter regarding the tablet in the park across the street from the Colorado State Capitol has been thoughtfully considered.

The tablet in question has been at its present location for a number of years and I do not feel I should order its removal.

I understand your argument that the tablet and the contained commandments are directly opposed to the views of the Freedom From Religion Foundation, Inc. However, in turn, the tablet and the inscription are representative of the views of a large number of Colorado citizens.

Sincerely,

Roy Romer
Governor

PLAINTIFF'S
EXHIBIT
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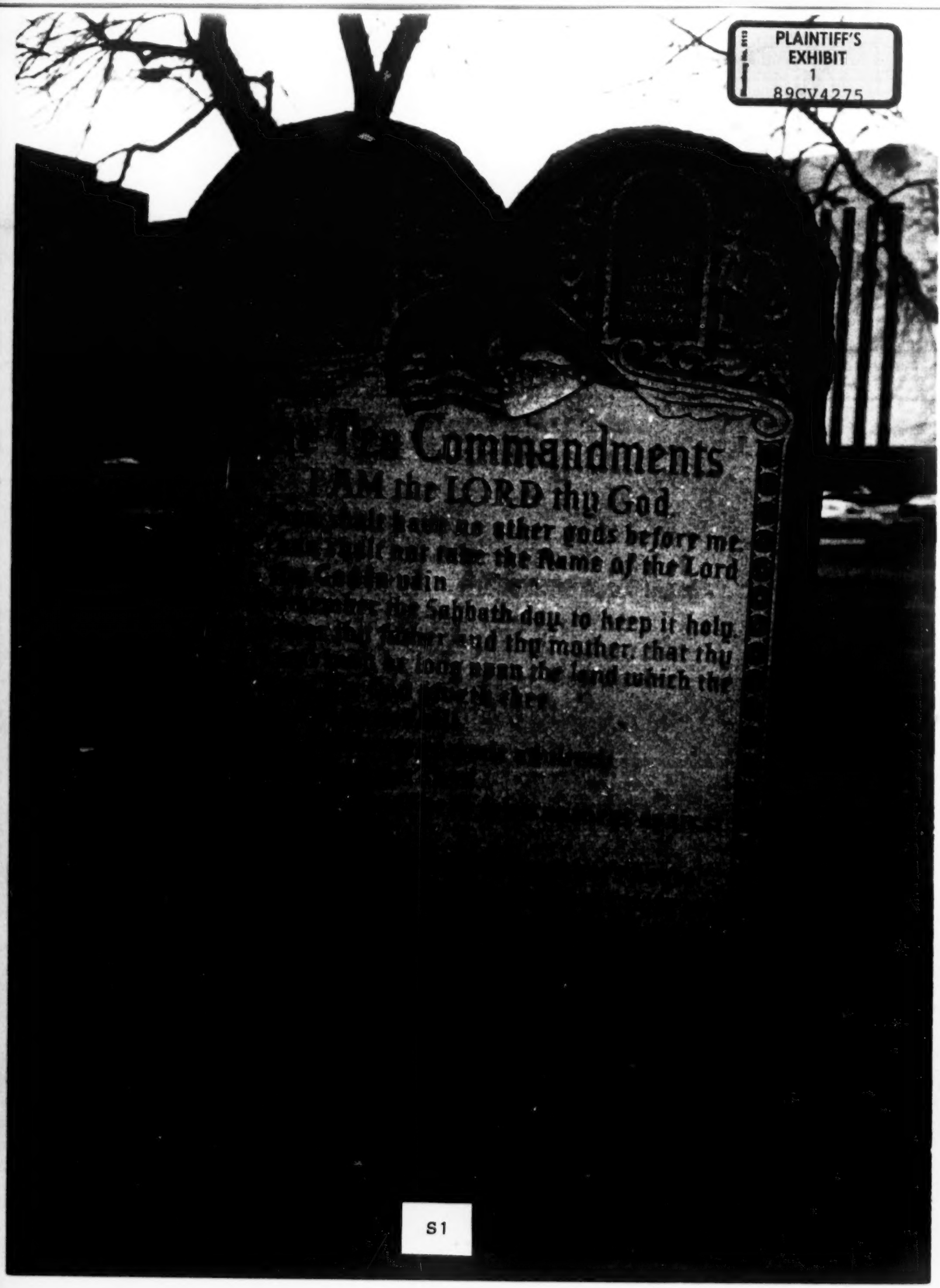
89CV4275



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Supreme Court, U.S.
FILED
JAN 19 1996
CLERK

No. 95-527

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

THE FREEDOM FROM RELIGION FOUNDATION, INC., a Wisconsin nonprofit corporation; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.; JEFF BAYSINGER; HAROLD HUGULEY; GLENN V. SMITH; and LEE WHITFIELD,
Petitioners,
vs.
THE STATE OF COLORADO; THE HONORABLE ROY ROMER, Governor of the State of Colorado; THE COLORADO DEPARTMENT OF ADMINISTRATION; and FORREST M. CASON, Executive Director of the Department of Administration,
Respondents.

On Petition for Writ of Certiorari to
the Supreme Court of the State of Colorado

RESPONDENTS' BRIEF IN OPPOSITION

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33 pp

QUESTION PRESENTED FOR REVIEW

Did the Colorado Supreme Court err in holding that the State of Colorado may permit an historical monument commemorating the Ten Commandments to remain along with many other historical artifacts in a park on the State Capitol grounds without violating the Establishment Clause?

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Harvey v. Cobb County, Ga., 811 F. Supp. 669 (N.D. Ga. 1993), *aff'd mem.*, 15 F.3d 1097 (11th Cir.), *cert. denied*, 114 S. Ct. 2138 (1994) . . 17, 20, 22, 23

Hughes Tool Co. v. TWA, Inc., 409 U.S. 363 (1973) 20

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Lemon v. Kurtzman, 403 U.S. 602 (1971) 4, 5, 10, 18, 19, 24, 27

Lynch v. Donnelly, 465 U.S. 668 (1984) 5-16, 18, 24-28

Stone v. Graham, 449 U.S. 39 (1980) 7, 9, 17-19

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No. 95-527

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

THE FREEDOM FROM RELIGION FOUNDATION, INC., a Wisconsin nonprofit corporation; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.; JEFF BAYSINGER; HAROLD HUGULEY; GLENN V. SMITH; and LEE WHITFIELD,
Petitioners,
vs.
THE STATE OF COLORADO; THE HONORABLE ROY ROMER, Governor of the State of Colorado; THE COLORADO DEPARTMENT OF ADMINISTRATION; and FORREST M. CASON, Executive Director of the Department of Administration,
Respondents.

On Petition for Writ of Certiorari to
the Supreme Court of the State of Colorado

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents perceive the following misstatements of fact in the petition. *See* Rule 15.2, Rules of the Supreme Court of the United States (Oct. 2, 1995).

The petition's description of the face of the monument (Pet. at 2) omits some of the symbols that the court

below concluded were reflective of religious diversity as well as secularism, ultimately contributing to the monument's consistency with the "melange of historical commemorative accounts" and "rich cultural diversity" that make up the setting. Pet. App. E24-25.

The petition at 2 states that the monument's text includes an "exhortation"; the court below did not find these words constituted exhortation.

The petition at 3 states "There are a number of similar monuments located on public grounds around the United States"; the court below found that monuments were donated to "several local and state governments, including Colorado" with no indication that any such monuments are currently extant elsewhere. Pet. App. E9.

The petition states that the monument was "part of a nationwide campaign to instill the principles of God's message to Moses in youngsters." Pet. at 3. However, the court below found that based on a belief that youngsters were "without any code of conduct or standards by which to govern their actions," a juvenile court judge thought "they could benefit from exposure to one of mankind's earliest codes of conduct," to demonstrate that there were long "recognized codes of behavior to guide and help them"; this program "was not to be a religious instruction of any kind." Pet. App. E8.

The petition at 5 states that the monument is "maintained by the State"; the court below found that "The State does not allocate funds to maintain the monument." Pet. App. E9. There was also testimony that if the monument were in need of repair the State would have recourse to the Eagles. R. vol. 3, p. 69, ll. 8-11.

The petition states that the court below decided that the setting "secularizes the monument." Pet. at 5. However, the court below held "[T]he monument's content and its setting among several much more prominent monuments in Lincoln Park and throughout the Capitol Complex Grounds sufficiently neutralize its religious character resulting in neither an endorsement nor a disapproval of religion." Pet. App. E12.

The petition at 6 states that "There is nothing in the immediate vicinity of the Ten Commandments monument," and that none of the other objects have any relevance to the Ten Commandments monument; in fact, the court below held precisely to the contrary. Pet. App. E23-24.

REASONS FOR DENYING THE WRIT

Introduction

In a highly fact-bound and narrow decision the opinion below closely followed the dictates of this Court in its Establishment Clause jurisprudence. The Colorado Supreme Court not only did not contradict any principle previously enunciated by this Court, but it in fact tied its holdings at every step of the way to principles previously enunciated by this Court.

The petition is replete with incorrect generalizations. For instance:

> This ruling has no foundation in law or fact and must not be allowed to stand. It is in direct conflict with this Court's decisions in *Allegheny County* and *Stone*, and with the de-

cision of the United States Court of Appeals for the Eleventh Circuit in *Harvey*.

Pet. at 5 (citations omitted). However, upon examination these statements do little more than assume a conclusion. The petition provides little, if any, specification as to exactly how the Colorado ruling is in conflict with the cited cases, except by way of the most superficial and ultimately misleading statements.

The petition meets none of the requirements specified in Rule 10, Rules of the Supreme Court of the United States (Oct. 2, 1995). Specifically, the Colorado Supreme Court has not "decided an important federal question in a way that conflicts with the decision of any other state court of last resort or of a United States court of appeals"; nor has it "decided an important question of federal law that has not been, but should be, settled by this Court"; nor has it "decided an important federal question in a way that conflicts with relevant decisions of this Court." At best, the petition is predicated upon erroneous factual findings, or the misapplication of a properly stated rule of law.

I. THE OPINION BELOW IS MERELY AN APPLICATION OF THE SETTLED LAW OF THIS COURT.

With only rare exception, this Court has applied the three tests developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to Establishment Clause cases. The tests are: that the governmental activity have a secular purpose; that its principal or primary effect be one that neither advances nor inhibits religion; and that it not foster an excessive government entanglement with religion. 403 U.S. at 612-13. The leading cases applying the *Lemon* tests to government

display of objects with religious significance are *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989). The opinion below is fully consistent with both *Lynch* and *Allegheny County*.

A. The Opinion Below is Consistent with *Lynch*.

Three of the principal teachings of *Lynch* are particularly relevant to the instant case: first, governmental action that constitutes acknowledgment of this country's religious heritage does not violate the Establishment Clause; second, courts may not use an "absolutist approach" in Establishment Clause analysis; and third, the *Lemon* test should be applied using the concept of the reasonable observer. The opinion below correctly employs each of these three teachings of *Lynch*.

1. Acknowledgment of Religious Heritage

This Court's opinion in *Lynch* surveyed the numerous historical and commonplace ways in which government acknowledges this country's religious heritage. The Court said:

> There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.

465 U.S. at 674. The Court then chronicled numerous "examples of reference to our religious heritage" in

governmental actions, including the employment of legislative chaplains with public funds; allowing public school children to be released from classes to attend religious exercises; national holidays such as Thanksgiving and Christmas which had their genesis as solely religious observances; the statutorily prescribed national motto of "In God We Trust" which appears on our currency; and the display of works of art with religious themes in public art galleries. The Court then noted that "There are countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." *Id.* at 677. It found inescapable the conclusion that "our history is pervaded by expressions of religious beliefs." *Id.* The Court held that each of these acknowledgments is permissible under the Establishment Clause.

The opinion below closely tracks this holding of *Lynch*: the presence of the Ten Commandments monument amidst various other symbols of our culture and history is a permissible acknowledgment of our religious heritage, and even more, of our respect as a people for the rule of law.[1]

The opinion below repeatedly reiterates and approves the trial court's conclusion that the Ten Commandments monument is one of a number of monuments which "overall contain symbols of various historic events or concepts

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[1] For instance, the opinion recounts the eloquent testimony of one witness that the monument could be seen as "a monument to the fact that we as a republic are a people who pay attention to law." Pet. App. E23 n.17.

associated with American history." Pet. App. E11. The Colorado Supreme Court concluded that:

> The various monuments found around the park in fact represent a cornucopia of different cultural events and experiences that make up the history of our nation and reflect upon a history that is also Colorado. . . . This collection of monuments . . . [is] an acknowledgment of the cultural tapestry that is Colorado.

Pet. App. E24. These findings do no more than mirror the sort of acknowledgment of our religious heritage that *Lynch* found permissible.

2. Non-Absolutist Approach

The second teaching of *Lynch* is that Establishment Clause analysis should not be "absolutist." Without using the term itself, the petition argues for the absolutist approach that *Lynch* rejected, focusing exclusively on the religious aspects of the monument and ignoring its setting as one of many artifacts of American and Colorado history present in the Capitol Complex Grounds.

The petition alleges that the opinion below is "in direct conflict" with the holding in *Stone* solely because that case found that the Ten Commandments are "undeniably a sacred text in the Jewish and Christian faiths." Pet. at 5, 7. In other words, petitioners maintain that the religious component of the Ten Commandments makes their display *per se* unconstitutional. This is not a holding of *Stone*, nor is it a principle this Court has enunciated elsewhere.

To the contrary, the *Lynch* Court recounted the ubiquity of official acknowledgment of our religious heritage throughout this country's history, and then noted:

> This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause . . . .
>
> Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith -- as an absolutist approach would dictate -- the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.

465 U.S. at 678.[2]

The Colorado Supreme Court correctly followed the non-absolutist approach of *Lynch*, noting:

> While the text of the Ten Commandments affixed to a monument would not be appropriately placed on state property *standing alone*, here the Ten Commandments monument and its countervailing secular text fits within the melange of historical commemorative accounts found in Lincoln Park.

Pet. App. E24-25 (emphasis in original).

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[2] *See also id.* at 680 ("Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.").

The court below stated it would not automatically impute a religious purpose or effect to every government action that in some way implicated religion; it instead applied the correct constitutional standard. "[A]ny religious meaning of legal consequence must ultimately flow from the character of the state action as perceived by an objective observer, but does not turn on whether the message, though secular, also has religious value." Pet. App. E26.

Applying the *Lynch* analysis overall to the instant case, the evident purpose of including the Ten Commandments monument in the larger display of the Capitol Complex Grounds was not promotion of its religious content, but celebration of our country's heritage through display of one of the traditional historic origins of Western Civilization:

> The record does reflect, however, through the testimony of several state employees, that the State's purpose in accepting any monuments in that park is not to endorse the message depicted in the various monuments, but rather to open the public park up to all different types of groups interested in utilizing the valuable state grounds.

Pet. App. E23.[3] Such a celebration is a legitimate secular

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[3] Contrary to the petitioners' argument (Pet. at 6-7), this Court has never said that the Ten Commandments may be afforded public recognition only in the context of *legal* traditions or *legal* history. *See, e.g., Lynch*, 465 U.S. at 677 ("notable and permanent" depiction of Moses with the Ten Commandments in courtroom); and *Stone*, 449 U.S. at 42 (Ten Commandments and the Bible "may be constitutionally used in an appropriate study of history, civilization, ethics, comparative religion, or the like") (continued...)

purpose, even if the symbol itself also has religious aspects. Pursuant to *Lynch*, the court below correctly focused on the State's overall purpose in landscaping the Capitol Complex Grounds and the consequent effect of non-endorsement, not the inclusion of the Ten Commandments alone.

3. Reasonable Observer Standard

The *Lynch* opinion makes clear that the belief of *some* observers that a government's display constitutes an endorsement of religion does not lead to an invalidation of the conduct under the *Lemon* test. The *Lynch* majority rejected the dissent's assertion that a display becomes unconstitutional if "some observers . . . perceive that the City has aligned itself with the Christian faith by including a Christian symbol in its display and that this serves to advance religion." 465 U.S. at 683. The concurrence of Justice O'Connor seconds this notion, adding that the perspective of the reasonable observer should be the proper focus of the inquiry. *See also id.* at 688 (a display makes adherence to a religion relevant to a person's standing in the political community if it "sends a message to nonadherents that they are . . . not full members of the political community, and an accompanying message to adherents that they are . . . favored members of the political community") (O'Connor, J., concurring).

The standard articulated by Justice O'Connor is not what *any* viewer, but what a *reasonable* viewer would believe or perceive. The concurrence focuses on "what viewers may *fairly understand* to be the purpose of the display." 465 U.S. at 692-93. What a reasonable observer

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[3](...continued)
(citing *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963)).

would perceive is in turn dependent on the setting or context in which the display appears.

It is clear that not all observers may be reasonable or neutral viewers who "fairly understand" the purpose and effect of a display. For instance, testimony in the instant case indicated that some had protested the existence of a Civil War monument on the Capitol Complex Grounds; others who are pacifists might disagree that symbols of U.S. military history should be displayed. Similarly, Petitioners focus upon the religious nature of the Ten Commandments.

The Colorado Supreme Court, however, followed *Lynch* and correctly inferred it could be "fairly understood" that in light of the purpose of the overall display, and in the context of the Capitol Complex Grounds, the Ten Commandments monument does not send a message of government endorsement of religion. Given the surrounding monuments even "in the immediate vicinity" (Pet. App. E23) of the Ten Commandments monument, let alone in the Capitol Complex Grounds as a whole, "In essence, the monument is found in what is much like a museum setting which, 'though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.'" Pet. App. E24.[4]

Similar to the "history and ubiquity" that Justice O'Connor associated with the *Lynch* display, the testimony of record throughout this case shows that Americans in

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[4] The opinion below thus correctly summarized the reasonable observer approach: "The message the object conveys in context is also significant in a determination of whether the display has the effect of endorsing religion, because the context may affect the message a reasonable observer would derive from the setting." Pet. App. E23.

general regard the Ten Commandments as not only religious doctrine associated with Christianity and Judaism, they view them in a generic sense as being synonymous with the rule of law and with the roots of American jurisprudence. *See* Pet. App. E10 ("[T]he Ten Commandments are the basis for many of our secular laws.") *See also* Pet. App. E22 ("[T]he historical fact [is that] the Ten Commandments has served over time as a basis for our national law."). *Accord Lynch*, 465 U.S. at 691 (permissible secular objectives described as "instilling most of the values of the Ten Commandments and illustrating their connection to our legal system.").

While some would not have it so, the Ten Commandments have a distinct "history and ubiquity" in American culture. They have become part of the warp and woof of Western civilization in general and of American civilization in particular. As the court below found, as displayed in this setting the Ten Commandments monument constitutes no more than a "recognition of a historical, jurisprudential cornerstone of American legal significance." Pet. App. E27.

B. The Decision Below is Consistent with *Allegheny County*.

The decision below is completely consistent with *Allegheny County*, in which this Court decided the constitutionality of two separate displays, one a creche, the other a menorah.[5] The discussion of *Allegheny County* in the petition consists almost solely of the statement that since the creche and the menorah were "treated as separate displays" in *Allegheny County*, the Ten Commandments monument in

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[5] The *Allegheny County* analysis, however, must be employed with care, since only a portion of the decision represents the opinion of a majority of the Court.

the instant case must be separated from all the other monuments on the Capitol Complex Grounds. Pet. at 6. This, of course, ignores the fact that there was no question but that the two displays in *Allegheny County* were separate, and there was no finding or even allegation to the contrary referenced in the opinion of the Court. In the instant case, the trial court as finder of fact heard evidence from both sides, including the petitioners' allegation that this one monument somehow stood alone, unlike all the other monuments on the Capitol Complex Grounds. That court nonetheless made the determination that the subject monument was not separate from all its counterparts, a finding that was merely affirmed by the Colorado Supreme Court.

The opinion of the Court in *Allegheny County* draws much support from both the *Lynch* majority and Justice O'Connor's concurrence therein. It affirms the three principles of *Lynch* discussed above. First, the Court acknowledged the rich and pluralistic religious tradition that is this country's heritage. "This Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American continent." 492 U.S. at 589. It went on to affirm that government may acknowledge the cultural aspects of a religious object or event. *Id.* at 601.

Second, *Allegheny County* rejected the absolutist approach that would disallow any display of a religious object purely because the object has such an aspect, i.e., focusing exclusively on the object's religious aspect and disregarding its surrounding context or setting. *Allegheny County* notes that while an object such as a creche is certainly capable of communicating a religious message, for purposes of its constitutionality the effect of the display in actuality "turns on its setting." 492 U.S. at 598. The Court compared the creche display to the permissible display in

Lynch, and concluded that "in this context" the display was impermissible. 492 U.S. at 602. The Court stated that its endorsement inquiry "examines the particular contexts in which the government employs religious symbols." *Id.* at 606. "[T]here is no hiding behind the fiction that *Lynch* decides the constitutionality of every possible government creche display." *Id.* at 609 n.57.

Third, the *Allegheny County* opinion utilized the reasonable observer approach which prohibits "making adherence to a religion relevant in any way to a person's standing in the political community." *Id.* at 594, quoting *Lynch*, 465 U.S. at 687. "The effect of the display depends upon the message that the government's practice communicates: the question is 'what viewers may fairly understand to be the purpose of the display,'" which "of necessity, turns upon the context in which the contested object appears." The Court reiterated the *Lynch* observation that a museum setting negates any message of endorsement of religious content. 492 U.S. at 595.[6]

Allegheny County then employed these principles to closely examine the context of the creche, finding the display to be impermissible. With respect to the creche, the opinion of the Court turned on the conclusion that the government was sending an "unmistakably clear" religious message of support and praise to a Christian God for the birth of Jesus, with "[N]othing in the context of the display [to] detract

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[6] *See also* 492 U.S. at 597 ("[T]he government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context," noting that these principles have been adopted and utilized by the Court in cases subsequent to *Lynch*). (Blackmun, J., joined by Stevens, J., concurring.)

from [this] religious message." 492 U.S. at 598, 600. *See also id.* at 601-02 ("[The county] has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. Under *Lynch*, and the rest of our cases, nothing more is required to demonstrate a violation of the Establishment Clause.").

Thus, *Allegheny County* supports the decision below. Here, there is *no* message appended to the Ten Commandments monument, such as "Glory to God in the Highest for having given us this code of religious conduct." The monument bears no banner or other indication that the State or anyone else is praising God for the giving of the Commandments; the State is thus not sending an "unmistakable message of support and promotion of Christian praise to God," or "suggesting that people praise God for" the Commandments. Instead, to a reasonable observer, in its context of the Capitol Complex Grounds, the Ten Commandments monument is like all the other monuments contained therein: the State is acknowledging the Commandments as a cultural phenomenon and part of our American heritage and history, along with the numerous other such displays found there.

Finally, there is a striking parallel between the *Allegheny County* Court's description of the permissible creche in *Lynch* and the Colorado Supreme Court's description of the Ten Commandments monument. In *Allegheny County* the Court said:

> Here, unlike in *Lynch*, nothing in the context of the display detracts from the creche's religious message. The *Lynch* display comprised a series of figures and objects, each group of which had its own focal point. . . . [T]here were objects of attention separate from the

> creche [having] their specific visual story to tell. . . . Here, in contrast, the creche stands alone: it is the single element of the display on the Grand Staircase.

492 U.S. at 598.

In the instant case, the court below "reiterated in detail the evidence in the record and the facts derived at trial" (Pet. App. E4-6), concluding that:

> As the trial court found, the Ten Commandments monument in this case does not stand alone and is not a conspicuous feature of Lincoln Park. In the immediate vicinity . . . are both the much larger Martinez Statue and the larger drinking fountain monument; secular monuments similar to those are also found throughout the Capitol Complex Grounds. . . .

Pet. App. E23-24. *See also* Pet. App. E24 ("The various monuments found around the park in fact represent a cornucopia of different cultural events and experiences that make up the history of our nation and reflect upon a history that is also Colorado. . . . This collection of monuments celebrates a history of standing up against oppression, foreign and domestic, and an acknowledgment of the cultural tapestry that is Colorado."). This conclusion is based on a multitude of evidence of record and stands in sharp contrast to the allegation that the Ten Commandments monument "stands by itself." Pet. at 6.

Therefore, similar to the creche in *Lynch*, and unlike the creche in *Allegheny County*, the display comprises a series of objects in the Capitol Complex Grounds or even in

only Lincoln Park itself. There are objects of attention separate from the monument, each with its own focal point, secular symbols with visual stories to tell, and the Ten Commandments monument cannot be characterized as the single element of the display.

II. THE DECISION BELOW IS CONSISTENT WITH THE HOLDINGS IN *STONE* AND *HARVEY*.

The petitioners misread *Stone v. Graham*, 449 U.S. 39 (1980) and *Harvey v. Cobb County, Ga.*, 811 F. Supp. 669 (N.D. Ga. 1993), *aff'd mem.*, 15 F.3d 1097 (11th Cir.), *cert. denied*, 114 S. Ct. 2138 (1994). The opinion below is not inconsistent with the holdings in either of these cases.

A. The Decision Below Does Not Conflict with *Stone*.

The petition alleges that because the Ten Commandments were found to be a sacred text in *Stone*, the opinion below is in conflict with *Stone*. Pet. at 5, 7. *Stone* has little if any relevance to the instant case. However, the fact that the petitioners believe it directly conflicts with the opinion below and is controlling reveals an incorrect understanding of the holding in *Stone*.

First, the petition's reliance on *Stone* ignores this Court's injunction that school setting cases constitute a distinct and specialized area of Establishment Clause law, and are not indiscriminately applicable to display cases outside the school setting. *Edwards v. Aguillard*, 482 U.S. 578, 583-85 (1987) (citing *Stone*). This Court has made clear that when it is dealing with displays in non-school

locations, its touchstones are the analyses in *Lynch* and *Allegheny County*; conversely, but equally clearly, the Court's analysis in school setting cases like *Stone* is specialized and particularized to that context. The *Stone* opinion itself underscored the Court's unique school-setting analysis, in that every case cited, other than *Lemon*, is a school setting case.

In *Stone* this Court stated that school setting cases constitute a distinct and specialized area of Establishment Clause law, and are not indiscriminately applicable to display cases outside the school setting. *Accord Allegheny County*, 492 U.S. at 594 (rejecting the applicability of *Stone* and noting "Closer to the facts of this litigation is *Lynch*."). In *Lee v. Weisman*, 112 S. Ct. 2649 (1992), the Court affirmed its special *Edwards* approach for school cases, noting its "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." 112 S. Ct. at 2658. In *Wallace v. Jaffree*, 472 U.S. 38, 81 (1985), Justice O'Connor, concurring, said that what is permissible in the non-school setting is not dispositive of what is permissible in the school setting. Her statement obviously implies the converse as well: what is impermissible in the school setting is not dispositive of what is impermissible in the non-school setting.

Next, *Stone* is in no way analogous or even relevant to the instant case. First, *Stone*, in fact, concerned the constitutionality of a Kentucky statute; second, the holding turned on the government's impermissible *purpose* in enacting the statute; and third, the holding was firmly based in its school setting. In contrast, in the instant case the placement of the monument has no genesis in a statute; petitioners do not appear to allege that the State's purpose is

unconstitutional; and the Colorado monument is not located in a school setting.

Stone is simply a brief per curiam opinion in which, based on the particular facts presented therein, this Court found that the State violated the first part of the *Lemon* test because the challenged legislation had no secular legislative purpose. 449 U.S. at 41. Rather, the government's *sole purpose* in enacting a law requiring display of the Commandments on school walls was religious, and therefore the statute was unconstitutional. *Id.* at 41. From this simple and limited holding, petitioners would engraft a much expanded principle that since the *Stone* Court stated that the Ten Commandments were a text sacred in the Jewish and Christian faiths, they may not constitutionally be displayed.

The *Stone* opinion further noted that the Ten Commandments were not integrated into the school curriculum, and drew the following central conclusion:

> Posting of religious texts on the wall *serves no such educational function*. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. [This is] *not a permissible state objective* under the Establishment Clause.

449 U.S. at 42 (emphasis added).

As has been discussed, in sharp contrast, the Ten Commandments monument in this case serves a number of predominant secular objectives.

B. The Opinion Below Does Not Conflict with *Harvey*.

The petition states that the opinion below is in direct conflict with the decision of the Court of Appeals for the Eleventh Circuit in *Harvey* because a display of the Ten Commandments was found unconstitutional therein. Pet. at 5, 8. Such a conclusion totally ignores the clear mandate of this Court that each display must be considered in its particular context and setting, as has been discussed.

Also, although the opinion of the U.S. District Court for the Northern District of Georgia was affirmed without opinion by the Court of Appeals for the Eleventh Circuit and this Court denied certiorari, this Court's denial of certiorari does not confer precedential value on the merits of a lower court decision. *Hughes Tool Co. v. TWA, Inc.*, 409 U.S. 363, 365 n.1 (1973). Even so, the opinions do not conflict: given the significant factual differences in the two cases, they are fully consistent.

First, the central and controlling factual difference in the cases is that in *Harvey* the trial court as the finder of fact found that the framed panel was the *only* element of the display's setting. "[T]he display stands alone in the alcove, and there are no countervailing secular passages or symbols." 811 F. Supp. at 678.

This is a far cry from the record in the instant case. While the petitioners argued to the trial court that the Ten Commandments monument was isolated, that it stood alone and apart from the other monuments and tributes in Lincoln Park, the trial court disagreed. The Colorado Supreme Court affirmed the trial court's factual finding that the monument is "displayed among other monuments and tributes on the grounds of the State Capitol" Pet. App. E3;

it is set "among several much more prominent monuments in Lincoln Park and throughout the Capitol Complex Grounds" Pet. App. E12. "As the trial court found, the Ten Commandments monument in this case does not stand alone and is not a conspicuous feature of Lincoln Park. In the immediate vicinity . . . are both the much larger Martinez Statue and the larger drinking fountain monument; secular monuments similar to those are also found throughout the Capitol Complex Grounds . . . ." Pet. App. E23-24; [there is a] "collection of monuments . . . an acknowledgement of the cultural tapestry that is Colorado. . . . [and a] melange of historical commemorative accounts found in Lincoln Park." Pet. App. E24-25.

The second significant and controlling factual difference in the cases was in the explicitly religious nature of the content of the Georgia panel: the Georgia court emphasized that the framed panel contained *both* the Ten Commandments and what is known as the "Great Commandment," which is explicitly attributed to Jesus of Nazareth.[7] It was this inclusion that led the Georgia trial court to find that, "[T]he Great Commandment . . . emphasizes the religious nature of the panel and its association with the Christian tradition." 811 F. Supp. at 677.

In the instant case, the Colorado Supreme Court affirmed the trial court's finding that the version of the Ten Commandments on the monument "was not identified with any particular religious group" Pet. App. E8; "The monument at issue here does not reproduce exactly the Ten Commandments as accepted by any particular sect." Pet. App. E21. The Colorado Supreme Court also found that the

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[7] "Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind; [and] Thou shalt love thy neighbor as thy self." 811 F. Supp. at 677.

face of the monument itself contained a "countervailing secular text" (Pet. App. E24) because its many secular and patriotic symbols (Pet. App. E21) created a "melange of civil, political, cultural, and religious meanings." Pet. App. E11 and E24-25. Also unlike the Georgia display, the Colorado monument itself contains a clear indication that it was not a creation of the State, but presented by the Fraternal Order of Eagles.

These significant factual differences naturally lead to different results. The Georgia court stated: "The Court concludes that the panel, when considered in its context, has the effect of endorsing religion in general and Christianity in particular and therefore violates the Establishment Clause." 811 F. Supp. at 678. The Colorado Supreme Court stated: "We find that, considering the monument and its placement in the park as well as the proximity of other monuments, the Ten Commandments monument is not isolated and, as displayed in Lincoln Park, does not convey a primarily religious message." Pet. App. E26.

The Georgia court's holding turned on the context of the display; similar to the creche in *Allegheny*, "Here, too, the display stands alone in the alcove, and there are no countervailing secular passages or symbols." 811 F. Supp. at 678. Such a description is unlike the setting of the Ten Commandments monument reviewed by the Colorado Supreme Court: "While the text of the Ten Commandments affixed to a monument would not be appropriately placed on state property *standing alone*, here the Ten Commandments monument and its countervailing secular text fits within the melange of historical commemorative accounts found in Lincoln Park." Pet. App. E24-25 (emphasis in original).

Finally, the consistency of the opinions is highlighted by the remedy specified in *Harvey*. The *Harvey* Court

stayed its order requiring removal of the panel to give the County, "an opportunity to include the panel in a larger display of non-religious, historical items, which may bring it within constitutional parameters." 811 F. Supp. at 671. This is precisely the current state of affairs with respect to the Colorado monument as found by both the trial court and the Colorado Supreme Court, i.e., the monument is part of a larger display of non-religious historical items. The remedy proposed by the *Harvey* Court describes the conclusion reached by the Colorado court concerning the monument as it currently exists in Colorado.

III. THE INSTANT CASE TURNS ON FACTUAL DETERMINATIONS MADE BY THE TRIAL COURT AND AFFIRMED BY THE COLORADO SUPREME COURT; THE OPINION ESTABLISHES NO NEW PRINCIPLES OF LAW, IS LIMITED AND FACT-BOUND, AND IS NOT OF GENERAL IMPORTANCE OR APPLICABILITY.

This Court has said that Establishment Clause cases require courts to engage in careful scrutiny of challenged government practices. There is no question but that such scrutiny is highly fact-specific and context-specific. Analysis must be done on an individualized basis, applying the principles enunciated by this Court. In the instant case, the issue of what a reasonable observer may fairly understand to be the message of the monument, as presented in its particular physical setting, is central. This determination must, in the first instance, be firmly grounded in a trial court's factual determinations. This Court has characterized its "endorsement formulation" as "fact-intensive." *Allegheny County*, 492 U.S. at 608.

This Court has made the precept of the individualized nature of each Establishment Clause inquiry clear in both *Lynch* and *Allegheny County*.

> In each case, the inquiry calls for line drawing; no fixed, per se rule can be framed. . . . The line between permissible relationships and those barred by the [Establishment Clause is not] straight and unwavering. . . . The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."

Lynch, 465 U.S. at 678-79 (quoting *Lemon*, 403 U.S. at 614). *See also id.* at 692-94 (O'Connor, J., concurring) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.").

Allegheny County reiterated the standards set out in *Lynch*.

> [O]ur present task is to determine whether the display of the creche and the menorah, in their respective "particular physical settings," has the effect of endorsing or disapproving religious beliefs. . . . Under the Court's holding in *Lynch*, the effect of a creche display turns on its setting. . . .

492 U.S. at 597-98. Further, the Court stated that its endorsement inquiry "examines the particular contexts in which the government employs religious symbols," *id.* at 606, acknowledging "the inevitably fact-specific nature of the question whether a particular governmental practice signals

the government's unconstitutional preference for a specific religious faith." *Id.* at 607-08. "[T]he effect of the government's use of religious symbolism depends upon its context." *Id.* at 597.

In this case, the determination of the context or setting in which the display is located and against which its constitutionality must be judged is a pivotal finding of fact that is central to subsequent legal analysis of constitutionality. The trial court heard extensive testimony and also, at the request of petitioners, personally viewed the monument and its setting and context. Based on a wealth of evidence of record, the trial court determined the "particular facts" of this matter. Pet. App. L4. It found that from "a view overall of its setting" and "as presented in its surroundings" (Pet. App. L10), the monument was one of "a number of monuments"; "there are many monuments on the state capitol grounds." Pet. App. L6. The court acknowledged the inconspicuous nature of the monument, noting that though the judge had passed by it "scores of time on foot," he could not identify its location until requested to visit it by the petitioners. Pet. App. L6.[8] The finder of fact thus rejected the petitioners' allegation that the monument stood alone or was somehow isolated from its counterparts.

The Colorado Supreme Court was similarly well-aware of the fact-based foundation necessary to proper legal analysis in Establishment Clause display cases. Throughout

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[8] Prior to this litigation, the monument in question has stood unchallenged and indeed largely unnoticed for over 30 years; similar to the creche in *Lynch*, its existence has been "marked by no apparent dissension." 465 U.S. at 684. Even one of the petitioners himself testified that he may have seen the monument previously, but did not know what it was because there were a lot of monuments there. R. vol. 2, p. 36, ll. 8-14.

the opinion it is clear that the court was fully mindful of this principle. For instance, at the very start of its opinion, the court noted that its conclusion was drawn "under the facts of this case." Pet. App. E3. This perspective was then further emphasized:

> [T]he evidentiary facts presented to the trial court . . . are essential to a complete understanding of this case. Therefore, we reiterate in detail the evidence in the record and the facts derived at trial.

Pet. App. E4. An examination of the text of the findings themselves emphasizes the specific fact-bound and narrow character of the holding, *e.g.*, "on the record before us". Pet. App. E25.[9]

The opinion below establishes no new principles of Establishment Clause law. Rather, it closely follows and applies the principles well-established in this Court's jurisprudence. Repeatedly throughout the opinion, the court below sought guidance from this Court's previous decisions, having frequent recourse to the exact words of *Lynch* and *Allegheny County*. For instance, the opinion below cites to

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[9] *See also* Pet. App. E25-26: "Establishment Clause cases require highly fact specific scrutiny which must be approached on a case-by-case basis. . . . The controlling question in this case is what a reasonable observer might fairly understand to be the primary message of the monument, *as displayed in its particular setting*. We find that, considering the monument and its placement in the park as well as the proximity of other monuments, the Ten Commandments monument is not isolated and, *as displayed in Lincoln Park*, does not convey a primarily religious message. . . . *[U]nder the particular circumstances before us today* . . . ." (Emphasis added.)

Allegheny County's utilization of the *Lynch* standard that "the effect of the government's use of religious symbolism depends upon its context." Pet. App. E17. Citing *Allegheny County*, 492 U.S. at 595, the opinion states:

> [T]he constitutionality of the Ten Commandments monument in this case will depend upon whether the display has the purpose or effect of endorsing or disapproving of religion. Resolution of that issue will rest in large part on the particular content and physical setting of the monument.

Pet. App. E21.

The opinion again mirrors *Allegheny County* as follows:

> The message the object conveys in context is also significant in a determination of whether the display has the effect of endorsing religion, because the context may affect the message a reasonable observer would derive from the setting.

Pet. App. E23.

After an exhaustive review of the evidence of record, and of the legal standards set out in *Lynch* and *Allegheny County*, the Colorado Supreme Court made its findings. The opinion repeatedly stresses that it is "applying the legal standard set forth in *Lemon* as modified by *Allegheny County*." Pet. App. E27.[10] The opinion below specifies that

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[10] *See also* Pet. App. E26 ("[A]pplying the objective observer test under the particular circumstances before us today.").

"after applying that test to the undisputed evidence and the findings set forth by the trial court," the trial court's conclusion of constitutionality was correct.

Petitioners argue that the court below erred in determining the context or setting of the monument, *i.e.*, that it is only one of many monuments comprising the Capitol Complex Grounds; they instead substitute their own determination that the monument is "isolated."[11] However, this dispute itself merely serves to point up the limited and fact-bound nature of the decision. The opinion below deals solely with the monument's very particularized setting in Colorado, establishes no new general principles of law. To the contrary, throughout its opinion the Colorado Supreme Court continuously has reference to the landmark decisions of this Court in *Lynch* and *Allegheny County*, and the legal principles enunciated in those cases.

While similar monuments may or may not exist in other geographic locations, each would be in its own different and unique context, so that the decision in the instant case does not control or provide precedent for the constitutionality of any other monument or display. Contrary to the petitioners' assertion that the instant case will be used by many state and local jurisdictions "as [a] basis for unwarranted intrusions on the United States Constitution" (Pet. at 8), no identical or even similar factual situation is

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[11] In the course of this litigation petitioners have repeatedly argued for a "rule of independent review" that would allow the trial court's factual findings to be disregarded, citing in particular (and taking out of context) a statement from Justice O'Connor's concurrence in *Lynch*. The issue was extensively briefed by the parties; the Colorado Supreme Court was unpersuaded by the petitioners' arguments and instead utilized customary standards of appellate review.

likely to arise. The factual and legal questions presented to and decided by the Colorado Supreme Court and their importance as precedent are not of the kind that has any effect beyond the four corners of the subject decision. This Court should eschew granting certiorari in such circumstances.

CONCLUSION

The decision of the Colorado Supreme Court in this case does not conflict with the settled law of this Court. The Colorado Supreme Court applied the controlling case law of this Court in a proper and unremarkable fashion. Accordingly, the Petition for Writ of Certiorari should be denied.

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Supreme Court, U.S.
F I L E D
JAN 29 1996

No. 95-527

In the
Supreme Court of the United States
October Term, 1995

The Freedom From Religion Foundation, Inc., a Wisconsin nonprofit Corporation; The Colorado Chapter of the Freedom From Religion Foundation, Inc.; Jeff Baysinger; Harold Huguley; Glenn V. Smith; and Lee Whitfield,

Petitioners,

v.

The State of Colorado; The Honorable Roy Romer, Governor of the State of Colorado; The Colorado Department of Administration; and Forrest M. Cason, Executive Director of the Dept. of Administration,

Respondents.

On Petition for Writ of Certiorari
to the Supreme Court, State of Colorado

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 15.6 of the Rules of the Supreme Court of the United States, Petitioners respectfully reply to the Respondents' Brief in Opposition to the Petition for Writ of Certiorari.

THE MONUMENT PRESENTS THE TEN COMMANDMENTS IN A RELIGIOUS, NOT A SECULAR, CONTEXT

The Opposition filed by the Respondents should not cause this Court to lose sight of the basic issues in this case. The Ten Commandments monument here involved was donated to the State of Colorado by the Fraternal Order of Eagles for the purpose of instilling the principles of God's message to Moses in youth. App. E8-E9. The monument sits in a public park immediately west of the State Capitol building along with several other monuments, all of which relate to war and armed conflict. App. E4-E6.

This is not a case where the Ten Commandments are displayed in a museum as part of our religious history. Nor is it a case where the role of the Ten Commandments in the development of our legal system is highlighted. There is not even a hint of a countervailing secular message on the monument to detract from the religious impact of the sacred text. The only message conveyed by the monument is religious; its placement in a public park unmistakably signifies official government endorsement of religion.

REPLY TO RESPONDENTS' ALLEGED MISSTATEMENTS OF FACT

For the record, Petitioners hereby address the Respondents' alleged misstatements of fact in the order presented by Respondents:

The Petition's description of the Ten Commandments monument is accurate. This is readily verified by examining Appendix S1 to the Petition which is a large color photograph of the monument.

The Petition was correct in describing the Ten Commandments as exhoratory. By their nature, they urge or strongly advise compliance.

The Ten Commandments are a sacred text. Contrary to the conclusions reached by the Court below, the monument does not reflect secularism. The only identifiable secular symbols on the monument are the American flag and bald eagle which denote governmental approval and are, therefore, objectionable. See App. S1.

The Court below found that various local chapters of the Fraternal Order of Eagles donated monuments to several local and state governments. App. E9. The Petition concludes, and logically so, that a number of similar monuments are located on public grounds around the United States. Indeed, one such monument was the subject of litigation in *Anderson v. Salt Lake City Corporation*, 475 F.2d 29 (10th Cir. 1973), *cert. den.* 414 U.S. 879 (1973).

The Petition characterizes the nationwide campaign to erect Ten Commandments monuments as intended to instill the principles of God's Message to Moses in youngsters. Respondents object, citing the lower court's statement that the program "was not to be a religious instruction of any kind." App. E8. This objection is curious considering that biblical history teaches that the Ten Commandments were given by God to Moses and that the first three commandments are wholly religious and have no discernible secular significance. See App. S1.

The record in this case clearly shows that the monument is owned by the State of Colorado and that it is maintained by the State. See App. E9. Contrary to Respondents' assertion (Opp., p.2), there is no evidence in the record that the State would have recourse to the Fraternal Order of Eagles if the monument is in need of repair. The testimony cited by Respondents stated instead that, if the monument were badly damaged, the State would ask the Eagles to repair it but that, if the Eagles said "no", the monument "would probably not be repaired". R. Vol. 3, p. 69, ll. 4-25.

The remainder of Respondents' alleged misstatements have to do with conclusions which are at issue in this lawsuit. The Court below concluded that the monument's content and setting sufficiently neutralize its religious character. Petitioners vigorously disagree with this conclusion. The closest of any of the alleged "neutralizing" monuments is about thirty feet away. The next closest monument is some fifty feet away in the opposite direction. App. E6. Given this, it was correct for Petitioners to say that there is nothing in the "immediate vicinity" of the Ten Commandments monument. Pet., p.6. Further, the Petition is correct in stating that none of the other objects in the park are relevant to the Ten Commandments monument or, in any way, negate its religious message. Pet., p.6.

THE PETITION COMPLIES FULLY WITH THE COURT'S RULES

Respondents claim that the Petition does not meet the requirements of the Court's revised Rules which went into effect on October 2, 1995. The Petition was filed on September 27, 1995 and, therefore, the old Rules applied. Undersigned Counsel was advised to this effect by the Court Clerk's office.

Whether under the old or the new Rules, however, this Court should grant certiorari. The decision of the Court below is in direct conflict with published decisions of this Court in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) and *Stone v. Graham*, 449 U.S. 39 (1980), *reh. den.* 449 U.S. 1104 (1981) and with the Eleventh Circuit Court of Appeals in *Harvey v. Cobb County, Ga.*, 811 F.Supp 669 (N.D.Ga. 1993), *aff'd.* 15 F.3rd 1097 (11th Cir. 1994), *cert. den.* ____ U.S. ____, 114 S.Ct. 2138 (1994).

CONCLUSION

This Court should order the monument to be removed. If it does not, it will effectively be sanctioning the indiscriminate placement of religious symbols on public property.

Respectfully submitted,

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January 29, 1996